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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 386

PHILLIPS PETROLEUM COMPANY, A CORPORATION, AND UNITED STATES FIDELITY & GUARANTY COMPANY, APPELLANTS,

vs.

R. O. JENKINS

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

FILED AUGUST 21, 1935.

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[fol. 1]

IN SUPREME COURT OF ARKANSAS

PHILLIPS PETROLEUM COMPANY, a Corporation, and UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation, Appellants,

vs.

R. O. JENKINS, Appellee

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed June 26, 1935

To the Honorable W. P. Sadler, Clerk of the Supreme Court of the State of Arkansas:

You are hereby requested to make a transcript of the record to be filed in the Supreme Court of the United States, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following:

1. Original petition for appeal from the Supreme Court of the State of Arkansas to the Supreme Court of the United States.
2. Original assignment of errors and prayer for reversal.
3. Original order allowing appeal.
4. A copy of the supersedeas bond and its approval.
5. Original citation with proof of service.
6. Original statement of basis of jurisdiction of the United States Supreme Court to review judgment of the Supreme Court of Arkansas upon appeal.
7. Original notice or statement pursuant to Paragraph 2 of Rule 12 of the Supreme Court of the United States, with proof of service.
8. A copy of the opinion of the Supreme Court of Arkansas.
9. A copy of the order of the Supreme Court of Arkansas overruling appellant's petition for rehearing.
10. A copy of the final judgment of the Supreme Court of Arkansas dated May 6, 1935.
11. A copy of the final judgment of the Circuit Court of Ouachita County, Arkansas (Transcript, page 28).
12. A copy of the complaint (Transcript, pages 1 to 5).

[fol. 2] 13. A copy of the answer of Phillips Petroleum Company (Transcript, pages 20 to 23).

14. A copy of the testimony of the following witnesses:

R. O. Jenkins (Transcript, pages 40 to 79, and 130 to 135).

Joe H. Myers (Transcript, pages 136 to 152).
Jim Forsythe (Transcript pages 155 to 171).
Will McGuire (Transcript, pages 172 to 177).
Thomas H. Norris, Jr. (Transcript, pages 177 to 182).
C. M. Oden (Transcript, pages 183 to 185).

15. Defendant's motion for instructed verdict, with the ruling of the court thereon (Transcript page 274).

16. Instructions by the court, with the exceptions thereto (Transcript, pages 275 to 285).

17. Verdict of the jury (Transcript, page 287).

18. Motion for new trial, with order of the court thereon (Transcript, pages 288 to 295).

18A. Copy of the supersedeas bond executed by U. S. F. & G. Co.

19. Statement showing the filing of the bond and the lodgment of copies of the allowance of appeal in your office.

20. A return of such allowance of appeal and the statement of costs.

21. A copy of this præcipe.

Please certify the same to the Supreme Court of the United States under your seal and in accordance with the rules of said court and the laws of the United States upon such appeal.

Dated this 21st day of June, 1935.

Marsh & Marsh, Mahony & Yocum, R. H. Hudson, R. L. Foster, Counsel for Appellant.

[File endorsement omitted.]

[fol. 3] IN SUPREME COURT OF ARKANSAS

[Title omitted]

SUPPLEMENTAL PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed July 3, 1935

To the Honorable W. P. Sadler, Clerk of the Supreme Court of the State of Arkansas:

Supplementing the præcipe heretofore filed herein, designating the portions of the record to be included in the transcript of the record to be filed in the Supreme Court of the

United States, you will please include in said transcript of the record the following:

1. A copy of all portions of the bill of exceptions not included in the original præcipe to the end that the transcript shall contain the entire bill of exceptions.

2. A copy of this supplemental præcipe, with proof of service.

Dated this 29th day of June, 1935.

Marsh & Marsh, Mahony & Yocum, R. H. Hudson, R. L. Foster, Attorneys for Appellants.

[File endorsement omitted.]

[fol. 4] Service of the foregoing supplemental præcipe is acknowledged this 1st day of July, 1935.

L. B. Smead, Robert C. Knox, J. V. Spencer, Counsel for Appellee.

[fol. 5] IN CIRCUIT COURT OF OUACHITA COUNTY, SECOND DIVISION

R. O. JENKINS, Plaintiff,

vs.

PHILLIPS PETROLEUM COMPANY and JOE H. MYERS, Defendants

COMPLAINT—Filed June 16, 1934

Comes the plaintiff, R. O. Jenkins, and for his cause of action against the defendants, Phillips Petroleum Company and Joe H. Myers, states:

1. That the defendant, Phillips Petroleum Company, is a foreign corporation, authorized to do business in the State of Arkansas, and is engaged in the business of operating oil and gas wells, producing oil and gas and laying and operating pipe lines for the transportation of oil and gas in the State of Arkansas, and in the Counties of Ouachita and Union, and at all times mentioned herein was engaged in such business;

2. That the plaintiff, R. O. Jenkins, is a citizen and resident of the State of Arkansas;

3. That the defendant, Joe H. Myers, is a resident of Union County, Arkansas;

4. That on April 5, 1934, and for sometime prior thereto, the plaintiff was in the employ of the defendant, Phillips Petroleum Company, in connection with the operation of its oil and gas wells and pipe lines in the State of Arkansas, and the Counties of Ouachita and Union, in the capacity of laborer; that defendant, Joe H. Myers, was at all times mentioned herein an employee of defendant, Phillips Petroleum Company, and a fellow servant of plaintiff;

5. That in the forenoon of April 5, 1934, the plaintiff, [fol. 6] together with other employees of the defendant, Phillips Petroleum Company, were engaged under the direction of their foreman, Jim Forsythe, in stringing a 2½" gas line for the defendant, Phillips Petroleum Company, at its Fleming lease in Union County, Arkansas; that while engaged in such work, and at about 10:30 o'clock in the forenoon, the plaintiff and defendant, Joe H. Myers, while in the performance of their duties for the said Phillips Petroleum Company, and under instructions from said foreman, were engaged in carrying a joint of pipe 2½" in diameter, 31 feet long and weighing about 250 pounds to the place where other employees were stringing said pipe line; that the plaintiff was carrying one end of said pipe line; that the plaintiff was carrying one end of said pipe on his shoulder and that the defendant, Joe H. Myers, was carrying the other end of said pipe on his shoulder, the plaintiff being at the front end of said pipe with his back to said Joe H. Myers and the said Joe H. Myers were proceeding with said joint of pipe the plaintiff came to a place in the ground where the roots of a sweet gum tree had rotted out and left a hole about eighteen inches wide, five feet long and twelve inches deep; that as plaintiff neared said hole in proceeding with said joint of pipe the said Joe H. Myers carelessly and negligently, and without warning to plaintiff, shifted the end of the said joint of pipe he was carrying from one shoulder to the other, and at the same time the said Joe H. Myers carelessly and negligently jerked on said joint of pipe causing the plaintiff to lose his balance and to step in said hole and fall; that plain-

tiff fell violently to the ground striking in a twisted position and causing the joint of pipe to fall and strike the plaintiff on his back in the region of his first and second lumbar vertebra.

6. That by reason of said fall so received by the plaintiff, as a result of the carelessness and negligence of the de- [fol. 7] fendant, Joe H. Myers, the plaintiff suffered the following injuries, to-wit:

(a) The first and second lumbar vertebræ were separated with attendant severe impact and concussion of the spinal cord in the region of the first and second lumbar vertebræ and the ligaments in the region of the spinal cord near the first and second lumbar vertebræ were bruised and torn with attendant adhesions bleeding and swelling; all of which caused pressure upon the spinal cord and resulted in Myelitic softening of the lower end of the spinal cord, causing injury and degeneration of the nerves of the spinal cord and the nerves running therefrom, with resulting motor and sensory paresis, loss of sensation of the lower extremities and loss of free locomotion of the legs, back and hips of the plaintiff and causing partial paralysis of the hips, legs and back of the plaintiff of the progressive type which will gradually grow worse until complete paralysis will exist;

(b) A severe injury to the Sacro-Iliac joints with contusions of the Sacro Iliac surfaces, resulting in a traumatic Sacro Iliac arthritis;

(c) A severe injury to the Pelvic bone; his Pelvis is tilted and the Muscles and ligaments of the region thereof are strained, torn and bruised;

(d) A curvature of the spine;

(e) A total loss of this sexual functions and powers;

(f) The bladder and rectal centers of the plaintiff are involved; the control of the plaintiff over the action of his bowels and the passing of his urine are impaired; this condition will progress until plaintiff will completely lose control of the action of his bowels and of the passing of urine and will lose complete control of the impulse to urinate or [fol. 8] to stool;

(g) That on account of his said injuries the health of the plaintiff has become greatly impaired, and his nervous system has been damaged and impaired; that all of his injuries are permanent and progressive and will continually grow worse; that on account of his said injuries the plaintiff suffered severe physical pain and mental anguish, and will continue to suffer for the balance of his lifetime;

7. That at the time of his injuries the plaintiff was 27 years of age and was in sound health and condition both physically and mentally; that at such time he was earning 48¢ an hour, working eight hours a day, and had reasonable expectancy for promotion so that his earning capacity would be greatly increased; that on account of such injuries the earning power and capacity of the plaintiff has been wholly destroyed; that the plaintiff is not, and was not, equipped to earn his living except by manual labor; that since his said injury and on account thereof plaintiff has been unable to perform manual labor or any kind of work whatsoever, and will be unable to perform any manual labor or work for the balance of his life time; that at the time of his said injuries the plaintiff was in the exercise of ordinary care for his own safety;

8. That the injuries to the plaintiff were caused solely on account of the negligence and carelessness of the defendant, Joe H. Myers, in the following particulars, to-wit:

The said Joe H. Myers while carrying one end of said pipe on his shoulder, as aforesaid, carelessly and negligently, and without warning to the plaintiff, shifted the end of the joint of pipe he was carrying from one shoulder to the other, and at the same time carelessly and negligently jerked on said joint of pipe causing the plaintiff to lose his balance and to step in said hole and fall as aforesaid;

[fol. 9] 9. That the injuries to the plaintiff were caused solely on account of the overt acts of the said Joe H. Myers as above set out, and at the time such acts were committed by the said Joe H. Myers he was a fellow servant of the plaintiff, both being in the employ of the defendant, Phillips Petroleum Company;

10. That by reason of his injuries, as aforesaid, the pain and suffering which he has encured and which he will en-

dure in the future and his loss of earning power and capacity, plaintiff has been damaged in the sum of $75,000.00.

Wherefore, premises considered, plaintiff prays judgment against the defendants, Phillips Petroleum Company and Joe H. Myers, and each of them, in the sum of $75,000.00, for his costs herein expended and for all other and proper relief to which he may be entitled.

L. B. Smead, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 10] In Circuit Court of Ouachita County

[Title omitted]

Separate Answer of Phillips Petroleum Company—
Filed Aug. 24, 1934

* * * * * * *

Comes now the defendant, Phillips Petroleum Company, and for its answer to the complaint of the plaintiff filed herein says:

It admits that it is a corporation authorized to do business in Arkansas, that it is incorporated under the laws of the State of Delaware and is engaged in the production and transportation of oil in Union and Ouachita Counties, Arkansas.

It admits that on April 5, 1934 the plaintiff was in its employ and that in said date he, together with other employees of this defendant, were engaged, under direction of their foreman in stringing 2½" — at defendants Fleming Lease in Union County, Arkansas. It admits that Plaintiff and Joe H. Myers, one of defendants employees, were on that date engaged in carrying a joint of 2½ pipe to the place where other employees of this defendant were engaged in connecting and laying such pipe.

It denies that said joint of pipe complained of was 31 feet long, denies that it weighed 250 pounds, admits they were, that is to say, plaintiff and the defendant Joe H. Myers, carrying the joint of pipe on their shoulders and that plaintiff was at the front end of said pipe and leading

the way, with his back to the defendant Joe H. Myers, denies that they or either of them came to any place where [fol. 11] roots of a sweet gum had rotted out and left any hole, denies *there* there was any visible hole in the ground, and denies that the defendant Joe H. Myers shifted said pipe from one shoulder to the other, and denies that said Joe H. Myers carelessly, negligently or in any manner what ever jerked said pipe, or in any manner caused plaintiff to step in a hole, or to lose his balance and fall, denies that the plaintiff fell violently to the ground, striking same in a twisted position, or that he in any manner caused said pipe to fall on plaintiff or to strike him on the back as alleged and denies that it did strike him on the back or in the region of his first and second lumbar vertebrae, as alleged in the complaint.

Defendant denies that as a result of any such fall as complained of and specifically denies that as a result of any negligence or carelessness on the part of the said Joe H. Myers, the plaintiff suffered the injuries complained of, and specifically denies that plaintiff's first and second lumbar vertebrae were separated and that he suffered any severe impact or concussion of the spinal cord near the first and second lumbar vertebrae, and denies that the ligaments in the region of the spinal cord near the first and second lumbar vertebrae were bruised and torn and that same was attended with adhesions, bleeding swelling or that any pressure was caused on the spinal cord causing any degeneration of the spinal cord and nerves running therefrom or that any motor and sensory paresis resulted therefrom and denies that there is loss of sensation of the lower extremities and loss of locomotion of the legs, back and hips or any partial paralysis caused thereby, as a result of any injury described by plaintiff in his complaint and denies that plaintiff's injuries will gradually grow worse.

Denies that plaintiff suffered any injury to the Sacro Iliac joints with any contusions thereof or of the surfaces [fol. 12] of same and *and* denies that he has suffered any traumatic Sacro Iliac Arthritis as a result of the things complained of.

Denies that plaintiff suffered any injury to the Pelvic bone at the time or place alleged in his complaint, or any curvature of the spine, or any loss of sexual function or any injury to the bladder or rectal centers, or loss of control

of his bowels and that said condition will progress and grow worse and denies that on account of any injuries alleged to have been received on the day alleged or at the place alleged the health of the plaintiff has become greatly impaired, his nervous system damaged and impaired and denies that such injuries are permanent, or that they will grow worse and that he will suffer and has suffered severe mental and physical pain and mental anguish, denies he was in good health and sound physical condition prior to the date of the alleged injuries, denies that he was earning 48 cents per hour at the time, that he worked regularly or that he had a reasonable expectancy of promotion or that his earning capacity would have increased, and denies that on account of any injury occurring to him at the time and place alleged, if any did occur, which is denied, he is unable to perform manual labor or work, or will be so incapacitated for the rest of his life and denies that at the time and place complained of the plaintiff was in the exercise of ordinary care for his own safety.

It denies that the injuries complained of, if any were sustained, were caused by the sole negligence and overt acts of negligence of said Joe H. Myers, a defendant herein and denies that such negligence consisted of said Joe H. Myers suddenly shifting said pipe and jerking same so as to cause the plaintiff to stumble and fall in a hole as complained of and denies that he has suffered and will suffer great bodily pain and anguish or physical impairment on account thereof and denies that he has been damaged in the sum of $75,000.00 or any other sum by reason of the acts [fol. 13] and things complained of.

Further answering this defendant said, that if the plaintiff is suffering any of the things complained of they are not the result of any injuries received on the day and date complained of nor at the place and under the circumstances detailed in plaintiff's complaint.

Defendant alleges that if any injury was sustained that it was the result of the plaintiff's own carelessness and negligence in failing to properly carry said pipe and to properly choose a safe method of carrying the same and a safe footing while carrying the same; that said pipe was only 21 feet long—2½ inches in diameter and weighed only 130 pounds per joint and the carrying of same was a simple operation calling for no special skill or experience and

causing no strain on any able bodied man and was not dangerous to plaintiff and that he assumed all risks of any dangers that he could reasonably foresee on account thereof and the risk of all dangers attendant thereon that could not be reasonably foreseen.

Wherefore, the defendant, Phillips Petroleum Company, without waiving any rights asserted in its petition for removal of this cause to the Federal Court heretofore filed herein and specially saving and reserving its exceptions to the ruling of the court in denying said petition for removal, files this separate answer to the complaint of the plaintiff herein and prays that plaintiff take nothing by reason of his complaint, as against it, and that it have its costs in this cause expended and all other proper relief, as it will ever pray.

Phillips Petroleum Company, Deft., by Mahony & Yocum, E. E. Godwin, Marsh & Marsh, Its Attorneys. Neil Marsh.

[File endorsement omitted.]

[fol. 14] In Circuit Court of Ouachita County

Verdict

"We the jury find for the plaintiff against the defendants Phillips Petroleum Co. and Joe H. Myers and assess the plaintiff's damages at $50,000.00.

J. W. Harrell, Foreman."

[fol. 15] In Circuit Court of Ouachita County

#3860

R. O. Jenkins

vs.

Phillips Petroleum Co. et al.

Judgment—Sept. 29, 1934

Now on this the 29th day day of September, 1934, the same being a regular day of the July Term of the Cir-

cuit Court of Ouachita County, Arkansas, Second Division, this cause coming on to be heard, comes the plaintiff, R. O. Jenkins, in person, and by his attorney, L. B. Smead, and comes the defendant, phillips Petroleum Company, by its attorneys, Marsh & Marsh, Mahony & Yocum and Gaughan, Sifford, Godwin & Gaughan, and comes the defendant, Joe H. Myers, in person, and by his attorneys, Marsh & Marsh, Mahoney & Yocum and Gaughan, Sifford, Godwin & Gaughan, and each of said parties announced ready for trial.

Thereupon, a jury composed of J. W. Harrell, and eleven others from the regular panel of the petit jury selected, impaneled and sworn, according to law, to try the cause.

The jury having heard the evidence adduced, the instructions of the Court and the argument of counsel, retire to consider its verdict, and afterwards on the same day returned into Court the following verdict.

"We the jury, find for the plaintiff against the defendants, Phillips Petroleum Company, and Joe H. Myers, and assess the plaintiff's damages at $50,000.00.

J. W. Harrell, Foreman."

It is therefore, by the court ordered and adjudged that the plaintiff R. O. Jenkins, do have and recover of and from the defendants, Phillips Petroleum Company and Joe H. Myers, and each of them, the sum of Fifty Thousand Dollars ($50,000.00) together with all his costs herein expended for which execution may issue.

[fol. 16] In Circuit Court of Ouachita County

Motion for New Trial—Filed Dec. 3, 1934

Comes now the Phillips Petroleum Company, one of the defendants herein, and moves the court to set aside the verdict of the jury, heretofore rendered herein, and to vacate the judgment of this court rendered thereon, and to grant it a new trial, and, for cause thereof, says:

First: Because the verdict of the jury is contrary to the law.

Second: Because the verdict of the jury is contrary to the evidence.

Third: Because the verdict of the jury is contrary to the law and the evidence.

Fourth: Because the verdict of the jury and the judgment of the court rendered thereon is for an excessive amount of damages.

Fifth: Because the excessive verdict of the jury appears to have been given under the influence of passion and prejudice.

Sixth: Because the court erred in overruling defendant's motion and petition for removal of this cause to the District Court of the United States, Western District of Arkansas, El Dorado Division, and in retaining jurisdiction thereof after petition for removal, notice of removal and bond for removal had been filed herein, to which ruling of the court the defendant, Phillips Petroleum Company, at the time excepted and asked that its exceptions be noted of record.

[fol. 17] Seventh: Because the court erred in overruling defendant's amendment to petition for removal of this cause to the District Court of the United States for the Western District of Arkansas, El Dorado Division, and in retaining jurisdiction thereof after said amendment had been filed, and to which ruling of the court the defendant, Phillips Petroleum Company, at the time excepted and asked that its exceptions be noted of record.

Eighth: The court erred in refusing to give in charge to the jury this defendant's requested written instruction Numbered 1, to-wit:

"You are instructed to return a verdict for the defendant, Phillips Petroleum Company".

To which refusal of the court to give said instruction to the jury the defendant, Phillips Petroleum Company, at the time excepted and asked that its exceptions be noted of record.

The error of the court in refusing to give said instruction was in this, to-wit: the only negligence alleged in the complaint was that of the individual defendant, Joe H. Myers, who was a fellow-servant of the plaintiff, and the evidence offered in the trial of the case tended to prove neg-

ligence only on the part of said defendant and the plaintiff. Under these facts, it clearly appeared that if the plaintiff was injured as alleged in his complaint, it was because of negligence on the part of himself and/or said individual defendant, and contributory negligence on his part and/or the negligence of his fellow servant, Joe H. Myers, was a good and complete defense to the plaintiff's cause of action, [fol. 18] and Sections 7137 and 7145 of Crawford & Moses' Digest of the Statutes of Arkansas, which purport to deprive this defendant of said defenses, are unconstitutional and void, in that they violate and contravene Section 1 of Article 14 of the Constitution of the United States of America in the respects hereinafter alleged.

Ninth: The court erred in giving in charge to the jury, over the objections of this defendant, plaintiff's requested instruction numbered 1, to-wit:

"You are instructed that if you find from a preponderance of the evidence that plaintiff and defendant, Joe H. Myers, in the performance of their duties as employees of the defendant, Phillips Petroleum Company, were carrying a joint of pipe as alleged in the complaint, the front end of said pipe resting on plaintiff's shoulder, and the rear end of said pipe resting on the shoulder of the defendant, Joe H. Myers; and you further find from a preponderance of the evidence that the defendant, Joe H. Myers, without warning, shifted said pipe from one shoulder to the other and jerked said pipe; and you further find that said shifting and jerking of said pipe without warning constituted negligence; and you further find, from a preponderance of the evidence, that, as a direct result of such negligence on the part of Joe H. Myers, in so shifting and jerking said pipe without warning, plaintiff lost his balance and fell and was injured, and you further find that the plaintiff was, at the time, in the exercise of due care [fol. 19] for his own safety, and had not assumed the risk, then you will find for the plaintiff and against both the defendants."

To the ruling of the court in giving said instruction defendant excepted and asked its exceptions be noted of record.

That said instruction is misleading and erroneous in this, to-wit: That it makes this defendant respond in damages for an act of its servant resulting in injury to his fellow-servant and is based on Sec. 7137 of Crawford & Moses' Digest of the Laws of Arkansas, and that same is invalid as violating the Fourteenth Amendment to the Constitution of the United States, Sec. 1, in that this defendant, a corporation, is a citizen and that it is denied equal protection of the laws in its property rights with other citizens of Arkansas who are individuals, in that said law (Sec. 7137 C. & M. Digest) attempts to make it respond in damages to its servant for the negligence of a fellow-servant, but does not impose upon individuals employing servants the duty to respond in damages to a servant for the negligent act of a fellow-servant, and that it is not alleged, nor was any proof offered to show, that this defendant, Phillips Petroleum Company, was operating any railroad, nor that it was engaged in the mining of coal, and in fact it was not engaged in operating any railroad or any coal mine.

Tenth: That the court erred in giving in charge to the jury plaintiff's written instruction No. 2, over the objection of the defendant, Phillips Petroleum Company, which in- [fol. 20] struction is as follows, to-wit:

"You are instructed that if you find for the plaintiff, your verdict will be for such an amount of damages as you find from a preponderance of the evidence in this case, will reasonably compensate the plaintiff for all physical pain and mental anguish suffered or endured by him on account of the injuries complained of, if any; also any further physical pain and mental anguish which the evidence may show with reasonable certainty the plaintiff will suffer and endure on account of the injuries sustained by him, if any; also any pecuniary loss heretofore suffered by the plaintiff on account of the injuries complained of, if any; and also such sum as will reasonably compensate the plaintiff for any damages which the evidence shows with reasonable certainty he will suffer in the future on account of diminished capacity for earning money, if any; provided, however, if you find that the plaintiff was himself guilty of negligence contributing to his injury, then you will find for the defendant, Joe H. Myers, and as to

the defendant, Phillips Petroleum Company, you will diminish the plaintiff's damages, if you find he is entitled to recover in proportion to the amount of negligence found by you to be attributable to the plaintiff."

To the ruling of the court in overruling said objections and in giving said instruction in charge to the jury this defend-[fol. 21] ant at the time excepted and asked that its exceptions be noted of record.

Said instruction was misleading and erroneous in this, to-wit: in said instruction the court charged the jury that contributory negligence on the part of the plaintiff was a complete defense for the defendant, Joe H. Myers, but that, as against the defendant, Phillips Petroleum Company, such negligence on the part of the plaintiff would diminish his damages, if he should be entitled to recover, in proportion to the amount of negligence found to be attributable to the plaintiff. This defendant, Phillips Petroleum Company, is a corporation organized under the laws of the State of Delaware and is therefore a resident and citizen of said State and of the United States of America. The plaintiff and the defendant, Joe H. Myers, were, at the time of the commencement of this suit, and since and now are, residents and citizens of the State of Arkansas. Said charge was, and is, based solely upon Section 7145 of Crawford & Moses' Digest of the Statutes of Arkansas. The only negligence alleged by the plaintiff was of and on the part of the defendant, Joe H. Myers, and, under said charge, the jury was instructed that it might find for the plaintiff and against the defendant, Phillips Petroleum Company, and for the defendant, Joe H. Myers, and against the plaintiff. Said Section 7145 and the charge of the court thereon were, and are, in violation and contravention of Section 1 of Article 14 of the Constitution of the United States of America in depriving this defendant, Phillips [fol. 22] Petroleum Company, of its property without due process of law and in depriving said defendant of the equal protection of the laws, and said section of the Arkansas Statute is unconstitutional.

Wherefore, this defendant, Phillips Petroleum Company, respectfully prays that the verdict of the jury herein be set

aside and the judgment rendered herein be vacated, and that it be granted a new trial, and for all other proper relief.

Mahony & Yocum, Marsh & Marsh, by H. S. Yocum, for Phillips Petroleum Co., Defendant.

[File endorsement omitted.]

IN CIRCUIT COURT OF OUACHITA COUNTY

ORDER OVERRULING MOTION FOR NEW TRIAL

Thereupon, on the 3rd day of December, 1934, a day of the same Term, and at the time set by the Court, the said motion for new trial was presented to the court, and was by the court overruled, to which ruling of the court in refusing to set aside the verdict of the jury, and vacate the judgment of the court thereon, and grant a new trial herein, and in overruling said motion therefor, the defendant at the time duly saved its exceptions, and its exceptions were [fol. 23] duly noted of record.

Thereupon, defendant was granted ninety (90) days from December 3, 1934, within which to file its bill of exceptions in this cause, and upon the prayer of defendant it was granted an appeal to the Supreme Court of Arkansas.

[fol. 24] IN CIRCUIT COURT OF OUACHITA COUNTY, SECOND DIVISION

No. 3860

R. O. JENKINS, Plaintiff,

v.

PHILLIPS PETROLEUM COMPANY and JOE H. MYERS, Defendants

Bill of Exceptions

Be it remembered, that on the 27th day of September, 1934, being a day of the July Term, 1934, of the Ouachita Circuit Court, Second Division, before the Honorable W. A. Speer, the regular Judge of said Court, and a jury, duly

empanelled, the above entitled cause came on for trial, and in the course thereof evidence was introduced, objections made, exceptions taken and saved, and other proceedings had, which are as follows, to-wit:

[fol. 24a] The Plaintiff, to Sustain the Issues on His Behalf, Introduced the Following Testimony, to-wit:

R. O. JENKINS (the plaintiff), being first duly sworn that the testimony he should give in this action should be the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Mr. L. B. Smead:

Q. Your name is R. O. Jenkins?
A. Yes, sir.
Q. How old are you Jenkins?
A. I was twenty-eight this past August 20th.
Q. Twenty-eight this past August 20th?
A. Yes, sir.
Q. When were you injured?
A. April 5th.
Q. April 5th, 1934?
A. Yes, sir.
[fol. 25] Q. At that time you were twenty-seven years old?
A. Yes, sir.
Q. Who were you working for when you were hurt?
A. Phillips Petroleum Company.
Q. Where were you working?
A. We were working in the Flemming Bottom.
Q. Tell the jury where that is?
A. Well, it is on Smackover Creek; in Smackover bottom below Kenova.
Q. What?
A. In the Smackover bottoms below Kenova.
Q. About how far below Smackover was it there?
A. Well, sir, I could not say exactly; about something like three or four miles.
Q. In Union County, Arkansas?
A. Yes, sir.

Q. How long had you been working for the Phillips Petroleum Company?

A. I signed up with the Phillips Petroleum Company on the 12th day of February.

Q. 1934?

A. Yes, sir.

Q. How long had you been engaged in doing oil field work?

A. Ever since 1924.

Q. Where is your home?

A. Logansport, Louisiana.

[fol. 26] Q. How long have you been living in Arkansas, or, had at that time?

A. I have been here off and on ever since 1924.

Q. Since 1924?

A. Yes, sir.

Q. Have been doing oil field work?

A. Yes, sir.

Q. Is that the only kind of work you have ever done—manual labor?

A. Yes, sir: that is the only kind.

Q. What education have you?

A. I haven't got any; just write my name a very little.

Q. Are you qualified to do any kind of work except manual labor?

A. No, sir.

Q. What schooling have you had?

A. Third grade?

Q. Went to the third grade?

A. Yes, sir; just passed to the third grade.

Q. Now, the defendant Joe H. Myers, was he working for the Phillips Petroleum Company in the same gang you were?

A. Yes, sir.

Q. What kind of work were you doing the morning you were hurt?

A. Carrying pipe.

Q. Explain to the jury, and talk so that — can understand you?

[fol. 27] A. We were stringing a two and a half inch upset tubing line. I understood it was to be a gas line; that is what we were laying it for.

Q. How did you do that—explain to the jury?

A. Well, we got the wagon—drove up as far as they wanted to put the mules to this low flat we were stringing the line across, on account of it being soft; and they unloaded the pipe on the ground, and we were stringing it nearly as fast as one man could pull off the joint of pipe, off of the load. The line was coming up from the rear, and we were carrying it over there just joint by joint as we went along, laying it down.

Q. In other words, the further you laid the pipe the farther you had to carry the pipe to put it on the end joint?

A. Yes, sir.

Q. What were you—at the time you were hurt—you fell—what were you and Joe H. Myers doing?

A. Carrying a joint of this same pipe; two and a half inch up-set pipe.

Q. Where did you get that joint of pipe?

A. Where the wagon unloaded it.

Q. How far was that from where you were supposed to carry it and deposit it?

A. Something like thirty or forty yards; may be a little farther.

Q. May be a little bit farther?

A. Yes, sir.

[fol. 28] Q. What kind of pipes, or pipe, was this that you were carrying?

A. Two and a half inch up-set.

Q. Two and a half inch up-set?

A. Up-set tubing.

Q. You mean, two and a half inches in diameter?

A. Yes, sir. Up-set means it is up-set in the collar. It is bigger in the collar than at the pipe.

Q. It is bigger at the collar?

A. Yes, sir.

Q. How long was the joint of pipe?

A. It was about thirty-one or two feet long.

Q. Thirty-one or thirty-two feet long?

A. Yes, sir.

Q. How much would the joint of pipe weigh, if you know?

A. I never did get the correct weight of one. I would imagine about two hundred and fifty pounds.

Q. You think it would weigh about two hundred and fifty pounds?

A. Yes, sir.

Q. Two and a half inch pipe, thirty-one or two feet long?

A. Yes, sir.

Q. How were you carrying this joint of pipe; that is, how were you carrying your part of it?

A. Carried it on my right shoulder.

[fol. 29] Q. You were carrying your end of it on your right shoulder?

A. Yes, sir.

Q. How did Joe Myers have his end of the pipe?

A. Well, I picked up my end and stepped—my end was in a little water, and I stepped out there to pick up my end, and he walked around the pipe and picked up the pipe and put it on his right shoulder. We both had it on the right shoulder. I stepped up, and stopped, and he walked around the water.

Q. What shoulder did he have the pipe on when he picked up?

A. On the right shoulder.

Q. And you had yours on the right shoulder?

A. Yes, sir.

Q. Explain to the jury—you were in front; you were in front of Myers?

A. Yes, sir.

Q. With the front end of the pipe on your right shoulder, and he was back of you, walking in the same direction, with the other end on his right shoulder?

A. Yes, sir.

Q. Explain to the jury just how you happened to fall; how you fell, and the circumstances about it?

A. We were walking like that (indicating one in front of the other), and he was behind. I stepped over some trash, and a bad looking place, and to see that he made it all right [fol. 30] I glanced back over my left shoulder, like this (illustrating to jury), and he still had the pipe on his right shoulder.

Q. How came you to fall—what did you fall in?

A. In a ditch. Looked like where an old sweet-gum stump had rotted out, and there was a hole practically eighteen inches deep, just estimating it, and five feet long.

Q. About five feet long and eighteen inches deep?

A. Yes, sir.

Q. And how wide?

A. About eighteen inches wide.

Q. About eighteen inches wide?

A. Yes, sir.

Q. Was that in the path that you had to follow?

A. Yes, sir.

Q. In carrying the pipe?

A. Yes, sir.

Q. Had you carried any joints of pipe before that, that morning?

A. Yes, sir; we carried out of the same path; we carried four or five joints.

Q. You went the same route with all of them?

A. Yes, sir.

Q. Just tell the jury, now, why you happened to fall. [fol. 31] Tell the jury what happened at that time, Jenkins?

A. As I went to step over the hole Joe changed shoulders—my estimation of it; because when I looked—(interrupted).

Q. Tell them what happened?

A. I fell in the hole. First, before I fell, as we were walking along I felt a jerk like that (illustrating), and then another one, as I was in the act of stepping the hole.

Q. As you were fixing to do what?

A. In the act of stepping the hole.

Q. Over the hole?

A. Yes, sir; over the hole. As I looked around; the next thing I knew I looked around, and I had my right arm under me like that, and I was lying cross-ways, sitting in the hole, with my left foot on the bell of the hole.

Q. Where did the pipe fall?

A. It struck me across the back.

Q. How far above your belt?

A. Just about six inches above the belt, there (indicating).

Q. It struck you about six inches above the belt line?

A. Yes, sir.

Q. You fell on which side?

A. On my right side, and my left leg was in the hole, you see.

[fol. 32] Q. You say—what position did you fall in? Did you fall in a straight position, or twisted position?

A. I fell with my right arm like this (indicating) and my left foot in the hole. I suppose you would call it a twisted position; and the pipe struck me across there (indicating). And I reached with my left arm and tried to get it out of the way. And Joe was standing there laugh-

ing, and I asked him to get it off of me; and he laid his end down, and picked it up, and I slid out from under it. About that time another fellow came up, and he asked me if I was hurt very bad, and I says, "I don't know", I says, "I feel funny". That was Mr. Grayson.

Q. Who was Mr. Grayson?

A. He was another man in the gang.

Q. Before you get away from that. I don't believe you are clear. What happened when you stepped over the hole? Go over that again, with reference to what Joe Myers did?

A. He changed the pipe from one shoulder to the other as I was in the act of stepping over the hole, and I fell.

Q. Let's get through with that before we pass it—Could you see him, or not?

A. No, sir.

Q. You were looking forward?

A. I was looking forward.

Q. Did you see the hole there?

A. I had to watch where I was going.

[fol. 33] Q. You saw the hole?

A. Yes, sir.

Q. You were looking at it as you were stepping over it?

A. Yes, sir.

Q. Tell the jury how you knew the pipe was moved from one shoulder to the other?

A. I felt the sudden jerk.

Q. Did you feel the pipe move?

A. Yes, sir. It was on my shoulder, and I felt it jerk like that (illustrating), and he had it in his left arm.

Q. When you looked back?

A. After I was down. I asked him to get it off of me.

Q. Explain, as well as you can, how you felt the pipe move; show the jury.

A. Just suddenly.

Q. Tell the jury how you know he changed it from one shoulder to the other?

A. I felt the jar.

Q. Did you feel the pipe raise up and go over?

A. Yes, sir; I could feel it as well as, almost as if I was looking at it.

Q. I want you to explain to the jury how you felt it move—just all about it?

A. I felt the pipe raise up. As it come up it gave me a [fol. 34] jar, like that (illustrating), and as it come down I felt the jar, and I went in the hole.

Q. Had the pipe moved over before the second jar?

A. Before the second jar?

Q. Yes?

A. Yes, sir; moved on my shoulder.

Q. You could tell by the movement of your end of the pipe that the other end of the pipe went up, and over?

A. Yes, sir; I could feel it.

Q. Which direction was the first jerk, if you know, forward or backward?

A. It was forward.

Q. And the second jerk?

A. It was backward.

Q. Were those jerks—was it a violent jerk, or kind of pushing forward and backward?

A. It was a violent jerk.

Q. Both of them were violent jerks?

A. Yes, sir.

Q. I believe you say it caused you to lose your balance and fall in the hole?

A. Yes, sir; it broke the stride in stepping.

Q. Explain to the jury just what your physical feeling was after you fell down, with reference to pain, or anything of that kind; in your own opinion, tell the jury how you fell, and what happened?

[fol. 35] A. Well, I felt like a fellow that had a hard chill. Big drops of sweat stood out on my forehead, and I felt funny, and I turned sick at my stomach. I kept sitting around there; I didn't say anything to any of them. Mr. Forsythe—he was fixing to put some grease on the wire brush to clean the collars with—we didn't think to bring any along, and he was going to get some, and he said for us to string that pipe while he was gone.

Q. Who was your foreman, Jim Forsythe?

A. Yes, sir.

Q. Were you carrying the pipe under his directions?

A. Yes, sir.

Q. And you and Joe Myers were in the performance of your duties for the Phillips Petroleum Company at that time?

A. Yes, sir.

Q. Joe H. Myers was a fellow servant, working for the same company?

A. Yes, sir.

Judge Marsh: Don't lead the witness.

Mr. Smead: That is an immaterial matter. I just wanted to get it straight to save time.

Mr. Smead (continuing):

Q. Just go ahead and explain to the jury in your own way just what happened, where you went, where you went after that, and how you got there?

A. I pulled myself up, and when I got up, I thought I [fol. 36] might get to feeling better, but I wasn't feeling any better so I sat down on a log, I suppose as far as to the cuspidore from me, and I stayed there a little bit, and I kept getting sicker and weaker, and I thought I would walk over to a stump, as far as from here to the door (indicating), and I sat down. While I was sitting there Mr. Forsythe came up, and some of them mentioned it to him, and he says, "Are you hurt very bad", and I says, "I don't think so", just like that, you know. They went on about their work. So, I got up. He (meaning Forsythe) sat the grease down at the pipe that we had headed—three or four joints; and he sat it down there, and I got up to see if I could grease the pipe. When I moved around I got nervous and jerkified, and sick, and felt like I was going to faint. And I walked over there—there was another load of pipe cross this low flat place, they had unloaded, and they went over there to look at that. In the meantime we had strung our pipe a little wrong——

Q. We don't care about that detail. Go ahead and tell what happened?

A. They walked over there, and I tried to make it over there; and I got right up close—pretty close—and there was a log there, and I sat down on that log, and I kept feeling sick and fainty-like. I was going to get up anyhow, so I got up and started. In the meantime they walked back across to re-construct this line; we had started it wrong. So I went, then—started off, and Mr. Forsythe hollered [fol. 37] and says, "Are you going in, Jenkins", and I shook my head I believe I would, and he says, "How are you going", and I told him I didn't know; shook my head. I didn't speak.

Q. Why didn't you speak?

A. I didn't feel like it. I tried to, and he didn't hear me, and that is the only way I could make him understand.

Q. How did you get in?

A. Mr. Odin got me and carried me to the car—held my arm—and taken me to the doctor's office; and the doctor taken me to El Dorado to the X-ray man. And he brought me back home and put me on the bed, and I stayed there practically ten days. I forget the number; I don't remember how many days it was before I was able to go to his office.

Q. Who is this you are talking about?

A. Doctor S. S. Henry.

Q. You went to the Doctor's office?

A. Yes, sir. And he carried me down there about—he made a couple or three trips; one a day; he came to see me every day; sometimes in the afternoon. Every morning about eight o'clock, and sometimes in the afternoon. And so, I didn't like the way I was getting along—of course, when a fellow is suffering he suffers so much I suppose he feels different. I didn't think he was giving me the treatment I ought to have; and I would ask him about my condition, and all he ever said "you have got a mighty bad [fol. 38] back; you will be all right in possibly a few weeks."

Q. Where did you go then?

A. I called Mr. Odin up——

Q. Who is Mr. Odin?

A. The superintendent for the Phillips—Oldham, or Odin.

Q. You called him up?

A. I had my brother-in-law to go and call him, and they come out and looked at me, and says, "well, we will move you in a little bit", and they walked out of the house. So, after a while they brought Doctor White out there, and he came out and made an examination.

Q. This Doctor White; that is Doctor White, of El Dorado?

A. Yes, sir.

Q. He is the Company's doctor—did the company send him to you?

A. Yes, sir.

Q. How long did he treat you, Mr. Jenkins?

A. He treated me from the 21st; that was about the 21st of the month; he treated me to the first. He put me in the hospital.

Q. How long did he treat you?

A. From the 21st to the first of April.

Q. 21st of what?

A. April.

[fol. 39] Q. He treated you from the 21st of April to the 1st of what month?

A. May; in the hospital; and then they carried me back. They carried me back several times; I don't know how many trips I made. He was giving me shots for pyorrhea and lumbago.

Q. What?

A. Lumbago. For my teeth and mouth, in other words. So Mr. Odin says, "I cannot take you up here, anyway, every other day"; they were carrying me. The next trip, I forget whether it was Friday, or Monday—Saturday or Monday—Doctor White told him whatever day was convenient—said Mr. Smith or some of the boys would take me up, and none of them has ever showed up.

Q. And the Phillips Petroleum Company didn't take you down to the doctor any more?

A. No, sir. On the 14th I called Doctor Henry up and asked him to come see me—(interrupted)

Q. At any rate, Jenkins, since you were hurt, you tell the jury, or, tell the jury, with all the treatment you had, both in and out of the hospital, did your condition grow beter or worse?

A. Worse.

Q. Can you tell the jury, so they can understand, how you got worse, or how you feel worse, if you do?

A. My feet from the hips down are heavy, and have a [fol. 40] dead feeling; don't feel nothing like natural; anyway, at no time since I have been in the hospital; since I got worse with the soreness in the back.

Q. What was the condition of your back where the pipe hit you, and your feeling, with reference to pain, or feeling; what about that place in your back there, with reference to whether it is painful now, or not?

A. It is not painful in the back, but hurts up over each hip.

Q. Did your back hurt at first?

A. Yes, sir; it was sore. It didn't seem to be—there was plenty of pain there, but I could not tell whether it was soreness, or what.

Q. What is the feeling of your back, back there now?

A. There is no feeling, you might say, from there down (indicating).

Q. Just like it is dead?

A. Yes, sir.

Q. I notice your walk is an unsteady and jerking walk; when did that start, and tell the jury how that came on you?

A. It has been that way; it started the day I got off of the bed to try to go to the doctor's office.

Q. Has it grown better, or worse?

A. It has grown worse.

[fol. 41] Q. Grown worse all the time?

A. Yes, sir.

Q. How much pain, if any, have you suffered since you were hurt, explain to the jury?

A. I cannot explain it; I just suffered death. It seems to me that I cannot make another day, now.

Q. With reference to the pain, where do you hurt?

A. All the pain through here (indicating) is about a six-inch space over each hip-bone; over this muscle right in there (indicating); over right in there (indicating) as near as I can show you. And there is a dull ache up back of my neck, right about there (indicating).

Q. What about the pain in your side; you testified about a pain in your side. Has that been there all the time, or just at some times?

A. You mean regularly?

Q. Yes, sir.

A. Yes, sir; it is there continuously.

Q. There all the time?

A. Yes, sir.

Q. Is it severe pain, or not?

A. It is awful severe hurting.

Q. What about sleeping at night; does it bother you?

A. Yes——

Q. In that respect?

[fol. 42] A. I get a couple of hours and a half of sleep at a time.

Q. Why don't you sleep any more?

A. It hurts so bad that I cannot.

Q. It hurts so bad that you cannot sleep?

A. Yes, sir.

Q. Now, has there been any effect on your bowels, or action of your bowels?

A. Yes, sir.

Q. Explain that to the jury?

A. Well, it is dead; I don't feel anything there; just slips from me.

Q. You mean your bowels move in your pants without you knowing it is going to happen?

A. Yes, sir; without any feeling.

Q. Has that condition been the same, or grown worse?

A. It grows worse; and my kidneys are the same way.

Q. You pass your urine without knowing it?

A. Yes, sir.

Q. You wet your pants all the time?

A. Yes, sir.

Q. Has that condition grown better or worse?

A. It is getting worse.

Q. What about your general condition that you have testified that resulted from your injury; does that stay the [fol. 43] same, or does it grow worse?

A. That grows worse.

Q. All of the conditions you have testified about?

A. Yes, sir.

Q. Prior to this injury that you received, what was your health, the condition of your health?

A. Well, I never was sick; never had any pains any places; felt like a young mule all the time. No man in the country could out work me.

Q. You were strong and healthy, both mentally and physically?

A. Yes, sir.

Q. Mr. Jenkins, while you were working for the Phillips Petroleum Company you were hurt—hurt one of your toes?

A. Yes, sir; on the 6th day of March.

Q. How did that happen?

A. Well, we were dragging——

Q. Don't go into detail. Did you drop something on it?

A. A joint of two and a half inch up-set tubing.

Q. Dropped on your toe?

A. Yes, sir; drug one of my toes.

Q. Is that the only injury you received?

A. Yes, sir.

Q. That got well and you went back to work?

[fol. 44] A. Yes, sir.

Q. Now, explain to the jury with reference to feeling in your legs; can you feel anything?

A. The feeling in my leg—the kind of feeling?

Q. Yes, and where?

A. I have no feeling, except where this bone is up here (indicating).

Q. I mean, if I put my hand on your leg, can you feel that (counsel putting hand on plaintiff's leg)?

A. I can feel it a little bit. It is not natural.

Q. Your leg is numb?

A. Yes, sir; numb—dead like.

Q. You can feel that (putting hand on leg)?

A. It don't feel like it is there. It feels like you are touching me here (indicating).

Q. What about your nerves?

A. Well, they are shot.

Q. Do you mean, are you extremely nervous all the time, or not?

A. Yes, sir.

Q. I notice you perspire freely all the time; what is the cause of that, if you know?

A. Mostly pain.

Q. Which?

A. Mostly pain.

Q. Have your sexual functions and powers been affected [fol. 45] in any way?

A. Yes, sir.

Q. To what extent—what about that?

A. Well, I just have no use for them.

Q. You have lost, on account of this injury, your sexual powers and functions?

A. Yes, sir.

Q. You are not able to have sexual intercourse?

A. Yes, sir.

Q. Have you been able to since the injury?

A. Not since the injury.

Q. How much money were you earning at the time you were injured?

A. Well, the best I can remember, they said they were paying forty-eight cents per hour.

Q. How many hours a day?

A. $3.80 for eight hours.

Q. You worked eight hours and got forty-eight cents an hour—how many days a week did you work?

A. Five days a week; we were off two.

Q. What had you been making? As I understand, at that time they were not working the crew full time?

A. Yes, sir; were off two days a week.

Q. You were off two days a week; that was because of the present condition?

A. It was the code; NRA Code.

Q. The Government required you to do that?

[fol. 46] A. Yes, sir.

Q. What had you been making before that; say, two or three years ago?

A. Well, I drew—up until 1929 I wouldn't take a job——

Q. When?

A. 1929. I wouldn't take a job for less than $4.50 a day.

Q. That was the customary wages for your kind of work?

A. Yes, sir. I never drew two checks, from 1924 until 1929, the latter part of 1929 or the first of 1930, for less than $6.00 a day.

Q. Of course you expected to receive promotion and get more?

A. I was offered one, but I could not take it because I didn't have the education.

Cross-examination.

By Mr. Yocum:

Q. Jenkins, what is your given name?

A. Roy Otto Jenkins; my full name.

Q. Where did you say you were raised?

A. I was raised at Logansport, Louisiana.

[fol. 47] Q. Where is that?

A. Forty miles beyond Shreveport, on the line of Texas and Louisiana.

Q. You say you have been working in the oil field since 1924; for what companies have you worked?

A. Texas Company; worked for the Sure Oil Company; a contractor, David Crockett and Walls; and for the Skelly

Oil Company. I cannot call over just all I have worked for.

Q. When did you work for The Texas Company?

A. I worked for them from 1923 to 1924, in the Pipe Line Department.

Q. What was the next company you worked for?

A. Sure Oil Company, in 1924; when I came to Smackover.

Q. And the next Company?

A. The Skelly Oil Company.

Q. The next?

A. Old man David Crockett and Walls; I worked for them—contractors.

Q. What year?

A. I believe it was in 1925 or 1926.

Q. Then who did you work for?

A. Worked for the Simms.

Q. What year?

A. 1926, some time.

Q. Who was the next employer?

[fol. 48] A. I will tell you, I could not say; first one and another. I would exchange from one to the other.

Q. Don't you remember who they were?

A. No, sir; I don't.

Q. You don't remember any company, or person, that you worked for since 1926?

A. Simms, in Big Springs, Texas, in 1929, was the last company that I worked for; and the Macmillan Petroleum Company. I was working on the extra-board for them, whenever I could, for a few days.

Q. When did you work for the MacMillan Petroleum Company?

A. This year, and the last part of last year.

Q. Before you went to work for the Phillips?

A. Yes, sir.

Q. Was all of the work you did in the oil fields done in Union County, except in 1929, when you were in Texas?

A. I worked all over the field; any place I could get a job.

Q. In Arkansas?

A. Yes, sir. I could not say whether it was in Union County, or whether it was in Ouachita County I worked.

Q. Can you say whether it was in Arkansas?

A. Yes, sir.

Q. But you cannot give us the names of any of the parties or companies that you worked for between 1926 and 1929?

[fol. 49] A. Yes, sir; old man David Crockett, and then he joined partners in Jackson with another party.

Q. You say David Crockett?

A. Yes, sir.

Q. He is an oil producer, or contractor?

A. Contractor.

Q. Where?

A. He lives at Minden, Louisiana, his home; he contracts wherever he can get a contract.

Q. Did you get hurt while you were working for any of these other people?

A. No, sir.

Q. Didn't you get hurt while you were working for Macmillan?

A. No, sir—well, I got a boil. I got some caustic on my thumb, and caused a rising—carbuncle. Caustic burns deep. What they wash the paint off of these big oil drums with.

Q. You worked for the Macmillan then?

A. Yes, sir; that time.

Q. How much time did you lose?

A. Well, I didn't lose any; I was on the extra-board, and I was off at the time.

Q. Now, you went to work for the Phillips on the 12th day of last February, I believe?

A. Something like that; twelfth or thirteenth.

[fol. 50] Q. How long did you work?

A. I worked to the 6th day of March, when I got my toe broke.

Q. Then how long were you off?

A. I was off until the first day of April.

Q. Off until the first day of April; and then what was the date of the accident for which you are suing?

A. 5th.

Q. This accident happened in Union county; is that right?

A. That is right.

Q. How many suits have you had for that accident?

A. Never had any.

Q. This is the first suit you filed?

A. This is the first time I have ever been in court.

Q. The suit originally filed was filed in Ouachita county; in this court here?

A. Yes, sir.

Q. Now, I understood you to say that the place of the accident was in a creek bottom?

A. Yes, sir.

Q. And that the ground was soft?

A. I reckon it was called a creek bottom; the creek was all over it.

Q. And they could not drive this team far out in the bottom; they had to unload the pipe back here on the firm [fol. 51] dirt, and you and the other men carried it out?

A. That is the way we did it. We argued the question among ourselves why they didn't string it across.

Q. I understood you to say on direct-examination that the ground was soft?

A. Which?

Q. Was the ground soft and boggy?

A. In spots, yes, sir.

Q. In spots?

A. Yes, sir.

Q. And they unloaded this pipe there about the well, didn't they?

A. Yes, sir; about thirty or forty steps of the well.

Q. How many joints of pipe had you carried before you fell?

A. We had carried practically four or five, I think. I cannot remember positively, but about five joints of pipe. We had the fifth, I think.

Q. And you and Myers carried together each time?

A. Yes, sir.

Q. How far had you carried this joint that you were carrying when you fell, before you fell?

A. Practically thirty or forty steps.

Q. How much farther did you have to carry it?

A. When I fell; how much farther was we to carry it?

[fol. 52] Q. Yes.

A. A little better than its length.

Q. What was the nature of the land; was it open land, or timbered land?

A. Well, it was flat, where the oil had killed all of the timber, and they burned it. There had been a forest at

one time, and the oil killed the timber out, and it was rotted, and the ground, most of it, was rough. There wasn't no hill, or anything like that. It wasn't too bad.

Q. You could walk in any direction that you wanted to, there?

A. No, sir.

Q. There was no trees or logs in your way?

A. Water.

Q. Water? There was no water there where you fell?

A. No, sir.

Q. How far were you from the water?

A. I could reach over and touch it with my hand.

Q. At the time you fell?

A. Yes, sir.

Q. You were walking along by a pond of water?

A. Yes, sir.

Q. Which side of you was the water on?

A. Both sides.

Q. How far were you walking from the place where they [fol. 53] were laying the pipe line?

A. I suppose four or five feet from the line—the joint we had just laid down.

Q. On which side of the line were you walking?

A. I was walking on the right-hand side of the line. The pipe was in the edge of the water.

Q. The pipe was in the edge of the water?

A. Yes, sir.

Q. Which side of the pipe line—which direction did the pipe line run?

A. I could not say.

Q. What direction were you walking at the time you fell?

A. Straight ahead.

Q. East, West, North, or South?

A. I could not say.

Q. You said that when you and Myers picked up this particular piece of pipe that you looked back?

A. I was standing looking at him when he picked it up.

Q. Standing looking at him when he picked it up?

A. Waiting for him to get his end up.

Q. Your back was to him?

A. No, sir; I was standing looking at the pipe like this (illustrating). He was getting that end (indicating), and I was getting the other.

[fol. 54] Q. Who shouldered the pipe first, you or Myers?

A. I did.

Q. When you shouldered it your back was to him, wasn't it?

A. No, sir; I was looking at him.

Q. How could you stand with your back—you were going to walk forward?

A. Just like this (illustrating). I come up like that.

Q. Hanging on the edge of your shoulder like that stick was?

A. It was up on my shoulder; in other words, just like that (illustrating with stick).

Q. What do you say this pipe would weigh?

A. Waiting for him to walk around the little puddle.

Q. How much did the pipe weigh?

A. About two hundred and fifty pounds.

Q. You don't know what the pipe weighed?

A. No, sir; I didn't weigh it.

Q. You say you think this pipe was thirty-one feet long; did you measure it?

A. I have measured quite a few of them.

Q. Did you measure this joint?

A. No, sir. The measurement was on it.

Q. Do you know how long it was?

A. That is what it said on it; thirty-one feet long.

[fol. 55] Q. You didn't make any measurement of it, did you?

A. No, sir. The measurement is marked on the pipe.

Q. Wasn't it twenty-one feet, instead of thirty-one feet?

A. No, sir.

Q. Now, when you and Myers shouldered this particular joint of pipe you were in front, and walking forward, is that right?

A. I was leading the way, yes, sir.

Q. You say you watched Myers put it on his shoulder and walk around some water?

A. Waited for him to walk around. As he walked out he stepped out in the water a couple of steps. It didn't run over the shoe-tops, but there was a little mud and water at the end of the pipe.

Q. Did you look back any more after you started; you and Myers?

A. After we got straightened out Myers stumbled slightly, and I looked back, and he still had the pipe on his right shoulder.

Q. Then what did you do?

A. Walked on.

Q. Did you look back any more?

A. No, sir.

Q. How do you know that Myers shoved this joint of [fol. 56] pipe from one shoulder to the other?

A. The last time I saw him I looked back and he had it on his right shoulder. After I fell I looked up, and asked him to get it off of me, and he had it in his left arm, and by the sudden jerks of the pipe I could feel that he undoubtedly shifted the pipe.

Q. How far were you from the end of the pipe?

A. I was about six inches. I was as far out on the end as I could get.

Q. How far was Myers from his end of the pipe?

A. Just as close as he could carry it.

Q. You were about thirty feet apart?

A. Yes, sir.

Q. And you say you felt the pipe move on your shoulder?

A. Yes, sir.

Q. And you didn't see Myers move it on his shoulder?

A. I didn't see him change it over his head.

Q. If he had stepped from one side to the other he would have moved the pipe on your shoulder?

A. Yes, sir; also if he moved it from one shoulder to the other.

Q. How do you know whether he moved the pipe from one shoulder to the other, or stepped to one side?

A. By him having it in his left arm.

Q. How do you know he hadn't caught it in his left arm when you fell?

[fol. 57] A. Well——

Q. You fell down, didn't you?

A. Yes, sir.

Q. And you said that his end of the pipe was just on his shoulder; in other words, he wasn't more than six inches from the end of the pipe—which direction did you fall?

A. Side-ways, like that (illustrating).

Q. Did you fall backward or forward?

A. Forward and side-ways.
Q. Forward and to the left?
A. Yes, sir.
Q. Did you fall forward as much as six inches?
A. I fell to the ground.
Q. You fell forward and to the left; did you fall forwards as much as six inches?
A. Practically.
Q. That would have pulled it off his shoulder?
A. No, he was coming towards me.
Q. If you fell faster than he was walking it would have pulled it off of his shoulder?
A. No, sir.
Q. You don't know which shoulder he had it on, do you?
A. I do, yes, sir.
Q. At the time you say you fell?
A. Yes, sir.
[fol. 58] Q. How do you know?
A. I saw him put it on there, and I looked back and he still had it on.
Q. How far had it been, when you looked back, from the place where you fell?
A. It was something like practically ten steps.
Q. About thirty feet?
A. Yes, sir;—a little further, from the hole where I fell.
Q. Did you see this hole?
A. Yes, sir.
Q. How wide did you say it was?
A. About eighteen inches wide.
Q. You were in the act of stepping over it, I believe you say?
A. Yes, sir.
Q. How deep was the hole?
A. Between twelve and eighteen inches deep.
Q. How long was it?
A. Possible five feet; may be longer than that, long.
Q. Did you ever see that hole before the time that you fell?
A. Yes, sir;: I had been over it once or twice.
Q. You had been walking over this same hole before you fell?
A. Yes, sir.

Q. Which foot stepped in the hole?

[fol. 59] A. The left one.

Q. Stepped in the hole with your left foot?

A. Yes, sir.

Q. Which side did you fall on?

A. Right shoulder hit the ground, and my left hip went in the hole—left leg—in the ditch.

Q. You stepped in that hole with your left foot and went down about eighteen inches, is that right?

A. It touched the bottom.

Q. And you fell to the right?

A. To the left.

Q. You fell over to the left, is that right?

A. Yes, sir.

Q. With the piece of pipe on your shoulder?

A. It went straight down; it was on my back when I made the effort to get up.

Q. Now, did the pipe remain on your neck when you fell?

A. No, sir; it was on my back.

Q. Where?

A. On my back.

Q. Didn't you say you fell on your side?

A. No, sir.

Q. Tell us, again, how you fell?

A. My left foot went in the hole, and the pipe on the right shoulder gave me a shove, like that (illustrated), in a twisted position. Had my left foot and leg in the hole, [fol. 60] and the pipe went down on my back, and hit me in the back. I reached down and pulled it up like that. I I could not get it off, laying there in that position, and he (Myers) was standing there laughing, and I asked him to get the pipe off of me.

Q. Do you say that you fell on your side?

A. I fell in a twisted position.

Q. Tell the jury exactly how you fell; did you fall on the side, on the stomach, or on the back?

A. I fell with my foot in the hole, and my arm on the edge of the hole, and my left shoulder in a twisting position, and the pipe fell across my back.

Q. You were lying over on your right side?

A. With my right shoulder—my left hip and my right shoulder was holding me.

Q. Which hip, did you say?

A. My left hip; left side, in other words, was down on the ground. This left leg was against the side of the hole, and this knee was across the ditch, and this shoulder (indicating) was down on the ground; this arm (indicating) under me, like that (illustrating). When I looked up I asked him to get the pipe off.

Q. You were resting on your left hip, and your right hip—did that right hip turn around in front of you? Is that what you tell the jury?

A. Under me.

Q. You were not lying on the ground, you were sitting up on your elbow?

[fol. 61] A. No, sir; I was lying on my elbow, arms, in other words, down under me.

Q. And you say this pipe rested on your back, and not on your shoulder?

A. Yes, sir.

Q. And it stayed there until Myers came around and removed it?

A. No; I pulled it up, myself, with my left arm, and tried to get out from under it, and I could not make it, and I asked him to lift it off of me.

Q. Did you say Doctor White treated you for pyorrhea and lumbago?

A. He said he did. I don't know. I taken his medicine.

Q. How long did he treat you?

A. From the 21st until I called Doctor Henry on the 14th of May.

Q. Doctor Henry treated you first, didn't he?

A. Yes, sir. I called Doctor Slaughter, and they wouldn't have him because Mr. Odin wouldn't recommend it; and they said they had as good a doctor as there was, and the company wouldn't have anything but the best; and they wouldn't make arrangements; and they kept taking me up there, and I had to have some attention.

Q. You said awhile ago, in answer to a question that I asked you, that this suit here in Ouachita county was the first suit that you filed, is that right?

[fol. 62] A. The first suit I had been in.

Q. No, I didn't say that; I didn't ask you that question. I asked you, first, how many suits you had filed, and you said one; and I asked you where that suit was filed, and you said this one in Ouachita county; is that the truth?

A. No, I filed the suit in El Dorado.
Q. Tell the jury what is right, about that?
A. At least an attorney did.
Q. Where did you first file your suit?
A. In Union county; El Dorado court.
Q. Who filed that suit for you?
A. Mr. Spencer.
Q. What became of that suit?
A. Withdrew it.
Q. That suit went to the Federal Court, didn't it?
A. No, sir.
Q. That wasn't removed to the Federal Court?
A. No, sir.
Q. You say that case wasn't removed to the Federal Court?
A. Not that I know of.
Q. Do you know about when it was you filed your first suit; the one in Union County?
A. No, sir; I don't have any idea. He (meaning lawyer) done the filing of it.

[fols. 63-112] Redirect examination.

By Mr. Smead:

Q. With reference to that suit that Mr. Yocum is talking about, Mr. Spencer filed that at El Dorado, and he wasn't representing you at that time?
A. No, sir.
Q. Later you employed me, and that suit was dismissed, and the suit was brought here?
A. Yes, sir.
Q. Nothing was ever done with that suit, except it was dismissed and brought here?
A. Yes, sir.

Recross-examination.

By Mr. Yocum:

Q. Do you know that, there was never anything done except to dismiss the suit in the Union Circuit Court?
A. That is what I asked to be done.

Q. You don't know whether it was taken over to the Federal Court or not?

A. No, sir.

Witness excused.

[fol. 113] R. O. JENKINS, the plaintiff, being recalled for further examination in his own behalf, testified as follows:

Direct examination.

By Mr. Smead:

Q. Jenkins, you testified this morning with reference to the defendant Joe H. Myers shifting his end of the pipe [fol. 114] and jerking it forward and backward. Did he give you any warning of his intention, or of the fact that he was going to shift this pipe, or jerk it?

A. No, sir.

Q. He didn't give you any notice of any kind?

A. No, sir.

Q. Did anybody give you any warning?

A. No, sir.

Q. With reference to stepping over this hole in the ground, was it necessary to step over that hole, in going the way you were going, or not?

A. Yes, sir.

Q. Why was it?

A. Because there was water on each side of the walkway.

Q. It was necessary to step over that, in carrying this pipe?

A. Yes, sir.

Q. Now, I suppose you testified about this: what was it—state again, if you have not already stated it, what was it that caused you to fall?

A. Shifting the pipe, and jerking it, caused me to step in the hole.

Q. Caused you to lose your balance and step in the hole?

A. Yes, sir.

[fol. 115] Cross-examination.

By Judge Yocum:

Q. Did you give Myers any notice you were going to step across this ditch?

A. No, sir.

Q. Why didn't you?

A. I didn't have time.

Q. You saw the ditch before you got to it, didn't you?

A. Yes, sir. I thought he was watching me.

Q. What?

A. I thought he was watching me. He had put me across once.

Q. You didn't give him any warning at all that you had to cross the ditch?

A. No, sir.

Q. You were leading the way, were you not?

A. Yes, sir.

Q. Was this land level where this accident occurred?

A. Well, practically level, all but the hole.

Q. All but what?

A. The hole.

Q. It is down in a creek bottom?

A. Yes, sir.

[fol. 116] Q. You didn't have to walk across that ditch?

A. To stay out of the water, I did.

Q. The ground was level?

A. More or less. It was bottom land; just about level. There was nothing like mounds in there, or anything like that, or hills to walk over.

Q. It was clear; there wasn't anything in your way was there?

A. Nothing more than water.

Q. How deep was the water?

A. Well, I didn't measure it.

Q. Have you got any idea how deep it was?

A. Well, you know, it starts off from small depths, I guess, and gets deeper. I don't know how deep the place was.

Q. How deep did it get out there?

A. I never measured it.

Q. If there was any water there at all it was just a little water on top of the ground?

A. No water where I was walking.

Q. How much space was there where you were walking?

A. The ground we followed set right on a hill, there, more or less.

Q. You had a way to travel of about twelve feet wide that didn't have any water on it?

A. On the little ridge. We come up to this point and it was narrow.

[fol. 117] Q. How wide was it?

A. About ten feet.

Q. How long was the ditch that you stepped in?

A. Ordinary estimate of it; I didn't look at the place very closely, and I haven't been back there since. I don't know exactly how long, but I estimate it to be about five feet.

Q. Then there was five feet there, there was no ditch or water in the way?

A. There was stumps, and soft ground; something like that.

Q. There was no water there, was there?

A. Not where we walked.

Q. Was there any water in this ditch where you stepped in?

A. No, sir.

Q. It was dry?

A. It was dry.

Q. How deep was that?

A. It was every bit of twelve inches.

Q. I thought you said eighteen?

A. Between twelve and eighteen.

Q. How much higher was the ground on which you were walking than the ground farther away where the water was standing?

A. Well, it could have been, possibly, twelve or fourteen inches, or two feet.

Q. In other words, there was a ridge there?

[fol. 118] A. Yes, sir.

Q. Are you sure about that?

A. Yes, sir.

Redirect examination.

Mr. Smead:

Q. How many trips had you and Myers made, carrying the pipe, the same day, before this accident?

A. I had made one trip over the hole, and one back empty. Had a load going over, and wasn't loaded coming back.

Q. You were asked with reference to giving notice; did Myers give you any notice that he was going to shift the pipe?

A. No, sir.

Q. Had you reached the hole at the time he shifted the pipe?

A. I was in the act of going over the hole.

Q. You had reached the edge of the hole, and in the act of stepping over it?

A. Yes, sir; with my left foot.

Witness excused.

[fol. 119] Plaintiff rests.

The defendants, to sustain the issues on their behalf, introduced the following testimony, to-wit:

JOE H. MYERS, one of the defendants, being first duly sworn that the testimony he should give in this action should be the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Judge Marsh:

Q. State your name to the jury?

A. Joe H. Myers.

Q. You are one of the defendants in this case?

A. Yes, sir.

Q. You know the plaintiff here, R. O. Jenkins?

A. Yes, sir.

Q. Were you working with him on the day, on the 5th [fol. 120] day of April, 1934.

A. Yes, sir.

Q. Where abouts?

A. Fleming Bottoms.

Q. What were you doing?

A. Pipe-lining.

Q. What were you doing with reference to pipe-lining?

A. Were laying pipe.

Q. Laying pipe?

A. Stringing pipe.

Q. Were you carrying any pipe with him?

A. Yes, sir.

Q. What kind of pipe?
A. Two and a half inch up-set tubing.
Q. How long were the joints?
A. About twenty-on or twenty-two feet.
Q. About twenty-one or two feet?
A. Yes, sir.
Q. Do you know what they would weigh?
A. No, sir.
Q. What had you been doing prior to that?
A. Laying pipe.
Q. Laying pipe—what did you do, screw it together?
A. Yes, sir.
Q. And you had gone back to get more pipe, after screwing up what you had laid?
[fol. 121] A. Yes, sir.
Q. How many joints had you and the plaintiff carried across the bottom there when he sustained the injury he alleges he sustained?
A. I don't remember; two or three, I guess.
Q. Now, I wish you would state—he says that you were carrying it on your shoulder, and he on his shoulder, and he was walking in front of you; was that correct?
A. Yes, sir.
Q. Which shoulder did you have the pipe on?
A. My left shoulder.
Q. Did you shift that pipe from your left to your right shoulder?
A. No, sir.
Q. Did you jerk the pipe in any way?
A. Not that I know of.
Q. Well, did you do it; was there anything to cause you to stumble or fall, or make you shift it, or jerk it?
A. No, sir.
Q. Was there anything unusual in the way you carried the pipe?
A. No, sir.
Q. Was there anything in his way, there, to keep him from walking straight ahead?
A. No, sir.
Q. Was that the same way you had carried the other [fol. 122] joints of pipe; you say you had carried two or three?
A. Yes, sir.

Q. And you carried them all down there that way?

A. Yes, sir.

Q. By this same place?

A. Yes, sir.

Q. Was there any hole there where he fell, before he fell?

A. No, sir.

Q. Did you see any hole there as large as he has described in his testimony, five feet long, and eighteen inches wide, and a foot to eighteen inches deep?

A. No, sir.

Q. Was there such a hole there?

A. No, sir.

Q. Tell the jury just what did happen?

A. Well, we were walking along, and the ground gave way with him, and it was about fourteen inches to eighteen inches—(interrupted)

Q. The ground gave way under his feet?

A. Right under his left leg, and he fell over, and the pipe fell on him.

Q. Was the ground soft there?

A. Yes, sir.

Q. And it gave way, and his foot got bogged up that way?

[fol. 123] A. Didn't bog up.

Q. Just gave way, next to a stump?

A. Yes, sir.

Q. Did you go out with the photographer the other day, to have a photograph made of the location?

A. Yes, sir.

Q. Mr. Jamison made the photograph, did he?

A. I didn't know what his name was.

Q. You were there when it was made, were you?

A. Yes, sir.

Q. Is that the photograph that he made (handing witness photograph)?

A. Yes, sir.

Q. Is that a correct photograph of the locality?

A. Yes, sir.

Q. I see that you are standing there in the photograph with your foot on a stump; is that the place where his foot went down in the ground?

A. Yes, sir.

Q. Was there any hole there before his foot went down in the ground?

A. No, sir.

Q. That is, that you could see from the top?

A. Not that I know of.

Q. You had been by there, ha*nd*'t you?

A. Yes, sir.

Q. You say, that you know of; you didn't know of any [fol. 124] hole being there, is that what you mean?

A. Yes, sir.

Q. Is that the stump by which he was passing when his foot went down?

A. Yes, sir.

Q. I see a small depression there; is that the place where it occurred?

A. Yes, sir; right around the stump.

Q. As near as you can locate it?

A. Yes, sir.

Q. When you were out there you put your foot there to show the place?

A. Yes, sir.

Q. And pressed down there to mark it, is that right?

A. Yes, sir.

Q. Is this (handing witness picture) a picture of the same thing, taken out a farther distance across the bottom there?

A. Yes, sir.

Q. Were you carrying the pipe the way he fell, the same way you were facing, at the time he fell?

A. Yes, sir.

Q. Is that (indicating on picture) the pipe line that you were carrying pipe to string?

A. Yes, sir.

Q. It is laying there yet?

[fol. 125] A. Yes, sir.

Judge Marsh: I want to introduce these two photographs in evidence. One is a close-up view, and one is a far off view.

The Court: Is there any objection to the introduction of the pictures?

Mr. Smead: No, we have no objection.

The Court: Let them be introduced.

Note by Reporter: The photographs above mentioned are marked, respectively, Exhibit 1 and Exhibit 2 to Defend-

ants' Testimony, and the same will be found herein immediately following the testimony of this witness.

Judge Marsh (continuing):

Q. When his foot went down in that place what occurred then?

A. He fell.

Q. How did he fall?

A. Fell to his left.

Q. His left foot went down, and he fell to his left; what became of the pipe?

A. Fell on him.

Q. Did you lose hold of your end of the pipe?

A. No, sir.

Q. Did his falling jerk the pipe from your shoulder?

[fol. 126] A. Yes, sir.

Q. Did you catch it?

A. Yes, sir.

Q. How did you catch it?

A. On the elbow.

Q. Caught it in your arms?

A. Yes, sir.

Q. Then what did you do?

A. Laid my end down and went up and took it off of him.

Q. Where abouts was it resting on him?

A. On the right shoulder; he was down.

Q. Across his right shoulder, while he was down?

A. Yes, sir.

Q. He was laying on his left shoulder, I believe you say?

A. Yes, sir.

Q. Then he wasn't laying on his right side?

A. No, sir.

Q. Had he got his foot out of the hole?

A. No, sir.

Q. What did you do after you took the pipe off of him?

A. Nothing.

Q. Did he get up then?

A. No, sir.

Q. Well, did he lay there—continue to lay there?

[fol. 127] A. The best I remember, he laid there a few minutes, and someboy picked him up. I don't know who it was.

Q. Why did he lay there a few minutes?

A. I just didn't pick him up.
Q. Who picked him up, do you remember?
A. No, sir.
Q. What did he do then?
A. Sat down on a log.
Q. How long did he stay there?
A. Just a few minutes.
Q. Where did he go?
A. Started home.
Q. Is that the last time you saw of him?
A. Yes, sir.
Q. Is the log shown in the picture, here, that he was sitting on?
A. It was a bunch of logs. It is not in there.
Q. Next to that bunch of logs?
A. Yes, sir.
Q. Just beyond?
A. Yes, sir.
Q. Is that the last you saw of him, when he went off home?
A. Yes, sir.
Q. How big a hole did his foot make in the ground, there; how big around?
A. About that big around, I guess (indicating about two [fol. 128] feet).
Q. It caved out?
A. Yes, sir.
Q. Was there any water around there close by?
A. I don't know.
Q. I mean, was the water in the way that you had to go by that stump?
A. I don't remember. There was water back up here (indicating on picture).
Q. You will have to show where it is?
A. It was about half-way between where Mr. Odin was standing, and here (indicating).
Q. What do you call that up here (indicating on picture)?
A. The tank.
Q. About half-way between the engine house and where you were standing in the picture, was water?
A. Yes, sir.
Q. Was there any water around where you and him stepped?
A. There was a little water in the holes, there.

Q. In the holes shown in the picture?

A. Yes, sir.

Q. How far would you say it was to the nearest water?

A. I could not say; I don't remember.

[fol. 129] Q. Was that the first day you carried pipe with him?

A. The first I remember of.

Q. Who else was working out there, lining up pipe?

A. There was about three or four more.

Q. Who were they?

A. Tommy Norris, a fellow named Pickett, and Grayson——

Q. Who was your foreman?

A. Jim Forsythe.

Q. And yourself. That composed the crew, did it, with Jenkins?

A. Yes, sir.

Q. Was McGuire there?

A. Yes—no, sir.

Q. McGuire wasn't in your crew?

A. He was in our crew, but they had sent him to another place that day.

Q. Now, how many times had you passed by that stump in carrying that pipe, with this plaintiff?

A. Well, I don't know. Just a joint of pipe, I guess.

Q. Every joint of pipe you had carried that morning you passed by that way, did you?

A. Yes, sir.

Q. You went down by the pipe that was lying there, and you were stringing the pipe the way you were facing in [fol. 130] the picture?

A. Yes, sir.

Q. And you say there was no hole at that stump until he caved—his foot caved in and made one?

A. Yes, sir.

Q. And that is when he fell?

A. Yes, sir.

Q. What caused him to fall?

A. The ground giving way, I guess.

Q. The ground giving way under his foot caused him to fall?

A. Yes, sir.

Cross-examination.

By Mr. Smead:

Q. Mr. Myers, you are still working for the Phillips Petroleum Company?

A. Yes, sir.

Q. What are you doing now?

A. Roustabouting.

Q. Same job you had?

A. No, sir.

Q. Same kind of work you did before?

[fol. 131] A. I am in the pulling crew now.

Q. Promoted, but the same kind of work?

A. Yes, sir; the same.

Q. You are now in the roustabout crew?

A. Yes, sir.

Q. About how big was this hole in the ground, that was caved out after he fell?

A. About that big around (indicating about two feet).

Q. Was it a round hole?

A. Kind of round.

Q. Two or three feet long, and how wide was it?

A. About the same.

Q. Two or three feet around?

A. About two feet.

Q. Pretty good size hole?

A. Yes, sir.

Q. Is that it, right there (indicating on picture)?

A. That is one of them—that is where the hole was.

Q. The hole has been covered up since then?

A. Yes, sir.

Q. That picture doesn't show the hole, except just a little of it?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

[fol. 132] Judge Marsh: That was the hole. We made that as a marker, to show where the hole was.

Mr. Smead (continuing):

Q. This hole here (indicating) is the hole you made the day you took the picture, so it would show where the place was?

A. Yes, sir.

Q. After this accident occurred, when he fell, the company filled up the hole; is that right?

A. Yes, sir.

Q. This land here (indicating on picture)—look at it in this picture; it looks kind of level, but it has little low places, crayfish holes, and things like that?

A. Yes, sir.

Q. This is just typical creek bottom land?

A. Yes, sir.

Q. Wasn't there pools of water on both sides along here (indicating on picture) at various places, all over that bottom?

A. Yes, sir; first one place and another.

Q. Don't you think there — pools of water on each side of the place where Jenkins fell, or, do you remember about it, one way or the other?

A. I don't remember about that.

Q. Which direction—you can get your location by this house; what kind of house is that?

[fol. 133] A. That is a derrick.

Q. About where did you pick up the pipe?

A. Right by the rig.

Q. Where were you carrying it to?

A. Right on the other side of where we were standing.

Q. The picture doesn't show where you were carrying it to?

A. No, sir.

Q. You were walking up this way (indicating on picture)?

A. Yes, sir.

Redirect examination.

By Judge Marsh:

Q. He asked you the question, if the company filled up the hole. Do you know whether the company filled up the hole or not?

A. No, sir; I don't know.

Q. Doesn't the rain fill up holes that are made there?

A. I don't know what filled it.

[fol. 134] Q. You don't know anything about anybody filling it up?

A. No, sir.

Q. You know it wasn't there until his foot caved in there?

A. Yes, sir.

Q. How long did you work around there after that?

A. I worked all day.

Q. You worked around there all day?

A. Yes, sir.

Q. When you got that pipe laid you went elsewhere?

A. Yes, sir.

Q. Was there anyone who worked there all the time?

A. Who me?

Q. No, was there anybody in the employ of the company, or of any other company, who stayed right there all of the time, on that particular lease, or place?

A. Every day?

Q. Yes.

A. Not that I know of.

Q. The rig you see in that picture is one of the pumping rigs?

A. Yes, sir.

Q. That is where you have a well?

A. Yes, sir.

Q. And a pumping unit?

A. Yes, sir.

[fol. 135] Q. Did you help weigh one of these joints of pipe yesterday?

A. Yes, sir.

Q. What did it weigh?

A. A little better than one hundred pounds.

Q. Was that joint of pipe just the same kind of pipe, of the same size and weight as the pipe you were carrying—you and him?

A. I don't know about the weight; it was the same kind of pipe.

Q. Same size, two and a half inch?

A. Yes, sir; up-set.

Q. It was what you had been using for tubing, but it was being then used for line pipe?

A. Yes, sir.

Q. For gas or oil?

A. Yes, sir.

Witness excused.

(Here follow 2 photographs, side folios 135a and 135b)

DEFENDANTS' EXHIBIT NO. 1

135-A

DEFENDANTS' EXHIBIT NO. 2

[fol. 136] JIM FORSYTHE, a witness for the defendants, being first duly sworn that the testimony he should give in this action should be the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Judge Marsh:

Q. Your name is Jim Forsythe?
A. Yes, sir.
Q. Your first name is Jim?
A. Yes, sir; Jim.
Q. Where do you live, Mr. Forsythe?
A. I live out from Wichita Falls eighteen miles, on the Morgan and White Lease—Phillips Morgan and White Lease.
Q. You are working for the Phillips Petroleum Company?
A. Yes, sir.
Q. Were you working for the Phillips Petroleum Company on the 5th day of April, 1934?
A. 1934?
Q. Yes.
A. Yes, sir.
Q. Where-abouts—that is the date this alleged injury occurred?
A. I was working on that Flem—Flenniken Lease, down in the bottom.
[fol. 137] Q. What were you doing?
A. We were laying a gas line to the Bilyeu Lease.
Q. What were you using to make a gas line?
A. Mixed pipe; up-set tubing, and plain tubing.
Q. What length joints?
A. The average lengths of the joints were twenty-one feet.
Q. Two and a half inch?
A. No, sir; it was two inch—no, two and a half inch; that is right.
Q. What position did you have there?
A. I was pushing the pipe line gang.
Q. You were foreman?
A. Yes, sir.
Q. Was Mr. Jenkins working there?

A. Yes, sir; he was working there.

Q. Mr. Myers in your crew, too?

A. Joe?

Q. Yes, sir.

A. Yes, sir.

Q. Who else was in your crew there, if you remember?

A. Joe, Tom Norris, Jenkins, and a red-headed fellow—Red Cameron.

Q. Did you see the accident alleged to have occurred there that day to Mr. Jenkins?

A. No, sir; I didn't see it, but I was there directly after it [fol. 138] happened.

Q. Did you see where it did happen?

A. Yes, sir.

Q. What did you see with reference—describe the location?

A. There was a stump setting over here (indicating with hands); pretty large stump; over here (indicating with hand) was another small stump. All I could see there was a small place on the ground, looked like where a fellow was walking and he stepped in loose dirt, and he went in there with his foot. Looked to be about four or five inches deep, where the ground gave way. That is all I could see.

Q. Had you been at that place in your work that day?

A. Yes, sir; we were stringing a line, and we walked all along there.

Q. Was there any hole there when you were stringing the line?

A. I didn't see one.

Q. If it had been one there would you have seen it?

A. Yes, sir; I was all around there.

Q. You walked up and down the line?

A. Yes, sir.

Q. There is defendant's Exhibit No. 1, which is a photograph——

[fol. 139] A. That is mighty plain. That is the line, there (indicating on photograph).

Q. Do you remember that stump that Joe Myers has his foot on, there—the stump?

A. Yes, sir; that is the stump, and this is the little place in the ground, there (indicating on photograph). There is the two stumps; they look like it.

Q. That is where it occurred?

A. Yes, sir.

Q. Had you passed by there before that time?

A. Yes, sir.

Q. The ground around there is all open?

A. Yes, sir. It was a forty acre lease; a big lease; and it was all open around there.

Q. Was it as open when that occurred as it appears in that picture, now?

A. Yes, sir; it was as open then as now.

Judge Marsh: I would like to have the witness come down here and identify this pipe.

The Court: Let them raise it up out there.

Note: Thereupon the pipe was raised up so the witness could see it.

Judge Marsh: (Continuing):

Q. Is that the kind of pipe you were laying?

A. Yes, sir; that is the same size and same kind of pipe.

[fol. 140] Q. Does that look like the same length?

A. Yes, sir; it was the same length.

Q. Did you have any thirty-one foot pipe in your outfit?

A. Thirty-one foot?

Q. Yes.

A. No, sir; we never run across any like that in laying the line. They ordered some extra tubing, that was thirty-one feet, but it was new.

Q. Did you use it out there that day?

A. No, sir; we didn't use that; it was new tubing.

Q. You used the new tubing in the wells, did you?

A. Yes, sir.

Q. And took the old tubing to lay the lines?

A. Yes, sir.

Q. You didn't see them weigh that joint of pipe?

A. No, sir. It weighs around one hundred and ten pounds, though.

Q. That is the average weight?

A. Yes, sir.

Q. One hundred and ten pounds?

A. Yes, sir.

Q. Of course, it will vary acording to how much it is corroded, or been worn by the pumping rods?

A. Yes, sir.

Q. Did you see the plaintiff, Mr. Jenkins, there, after the accident alleged to have occurred?

A. After it happened?

[fol. 141] Q. Yes.

A. Yes, sir.

Q. Where was he?

A. Where was he after it happened?

Q. Yes, sir.

A. I came back from getting some "dope" to go on the pipe, and he was sitting out there on the log.

Q. What do you mean by "dope" to go on the pipe?

A. Grease like that you put on the pipe to make it up, so there will be no grit on the pipe.

Q. You had been to the tool house to get that, and come back, and this occurred while you were gone; is that right?

A. Yes, sir.

Q. Well, did you speak to him?

A. Yes, sir; I asked him what was the matter with him.

Q. What did he say?

A. He said his foot and his side, and his back was hurt.

Q. Did he tell you how it happened?

A. Yes, sir; he said he fell in a hole.

Q. What did he do?

A. What did he do?

Q. Yes.

A. Well, he kept groaning and taking on, and I told some of the boys to take him to the doctor, and one of the boys [fol. 142] taken him in. Pickett taken him in.

Q. They took him to the doctor?

A. Yes, sir.

Q. Doctor Henry, or who?

A. I don't remember; they took him to Doctor Henry, or to El Dorado.

Q. Anyhow, they carried him to the doctor?

A. Yes, sir.

Q. He told you he fell in a hole?

A. Yes, sir.

Q. Did he tell you anything about Myers pushing him in, or jerking the pipe and throwing him in?

A. No, sir; he didn't tell me anything about that.

Q. When was the first time you ever heard him accuse Myers of causing him to fall in the hole?

Mr. Smead: I object to that. He can testify to the conversation, but not just what he heard about it.

The Court: No, that would not be competent.

Judge Marsh: (Continuing):

Q. Did he ever tell you so?

A. No, sir; never told me that Myers pushed him or caused him to fall, either one.

Q. Did he walk off from there?

A. Yes, sir; he walked away, with that fellow leading him; Pickett leading him. But he walked to Pickett's [fol. 143] car.

Q. He got in Pickett's car and went off?

A. Yes, sir.

Q. How long had he been working in your crew?

A. The last time, about five days before he got hurt.

Q. He came to your crew about the first of April?

A. Yes, sir.

Q. Well, had he been hurt before that?

A. Yes, sir; he was pulling—I wasn't working with him when it happened. I will tell you what I heard; I heard he got hurt in the production department, working as roustabout, and there was a pair of elevators fell on his foot.

Q. When he went back to work from that hurt he came to your crew?

A. Yes, sir.

Q. Did he complain any before this?

A. Before he got hurt the last time?

Q. Yes.

A. Yes, sir; complained the day before with his foot, and his side, and his back hurting him, and I put him on the easiest job I had—pounding collars. I offered it to him because he was complaining of his back.

Q. Then, did he complain that day—that morning?

A. The morning that he got hurt?

Q. Yes.

[fol. 144] A. Yes, sir; he was complaining.

Q. What was he complaining of?

A. His foot hurting him, and his side and his back hurting him.

Q. Did he get around actively, or clumsily?

A. It seems to me he was clumsy.

Q. How did he perform his work?

A. Before he got hurt?

Q. Yes. What I mean by that, did he appear to be hurting, from the way he did his work?

A. When he first went to work for me?

Q. Yes.

A. When he first went to work for me he done very good. At that time he was pounding collars, and it seems like he was clumsy with himself.

Q. Well, after he got his foot hurt he came back there and worked five days before he got hurt this time. How did he perform his work then?

A. Pretty poorly; pretty poorly. I would make everything as easy as I could on him because he was complaining.

Q. What did you have him doing that morning?

A. That morning?

Q. Yes.

A. Pounding collars.

Q. Using a hammer—why did you do that?

A. Because he complained of his foot, and his back hurting, and his side also.

[fol. 145] Q. Well, did he do anything else?

A. Yes, sir. I don't know—he wasn't making any success at that, so I put him on the board.

Q. Why did you do that?

A. He wasn't making any success at pounding collars.

Q. What I mean is this: What is the board, and what did it have to do in pipe-lining?

A. You put the board down on the ground, a board to hold the pipe steady while they hit it with the hammer.

Q. Is that a hard job?

A. No, sir; that is very easy.

Q. How came him doing this pipe work—carrying the pipe?

A. They didn't have nothing else much to do until the pipe was strung; I was gone after this "dope," and I told them to finish stringing the pipe while I was gone; and they strung six or seven joints, and I come back, and they were all setting down, and I asked them what was the matter, and they says he got hurt.

Q. If I get you right—see if I am not right. You had connected up the pipe you had out there, while he was pounding collars and holding the board, and you put them to stringing while you went to get the "dope"?

A. Yes, sir.

Q. Stringing means, putting the pipe out there and laying it down in position to be screwed together?

A. Yes, sir.

Q. That is what they call stringing?

[fol. 146] A. Yes, sir.

Q. And he and the rest of the crew went to putting pipe out there, what you call stringing it?

A. Yes, sir.

Q. And this happened while you were gone?

A. Yes, sir.

Q. Did you have him cleaning threads on some of the collars?

A. Yes, sir; I had him cleaning some threads to-.

Q. Did you have a conversation with him that day about some one else getting hurt?

A. He was telling me about a fellow that used to work for Macmillan, a great big fellow, and he said that he had been on the donation list for quite a while, two years, and it looked like that would be a pretty good thing.

Q. Did he say whether the fellow was hurt or not?

A. Well, he didn't say.

Q. What did you say to him about it?

A. I told him I wouldn't care to draw very much money like that.

Q. What did he say about it?

A. I believe that was about all that was said at that time.

Q. When did this conversation occur, with reference to this accident?

A. It was a day before the accident.

Q. The day before?

[fol. 147] A. Yes, sir.

Q. Did that occur in connection with this complaint about his back, side and foot?

A. Sir.

Q. Did that occur in the same conversation when he was complaining to you the day before of his back hurting him, and his foot hurting him?

A. Yes, sir.

Cross-examination.

By Mr. Smead:

Q. Mr. Forsythe, you were the foreman?

A. Yes, sir.

Q. How long have you been with the Phillips Petroleum Company?

A. Been working about four years, the last time; going on four years.

Q. Who did you work for before that?

A. I worked for them about three years.

Q. Who did you work for before that?

A. Before I went to work for the Phillips Petroleum Company?

Q. Yes.

A. I worked for the Magnolia, and also the Lion Oil [fol. 148] Company.

Q. Didn't you get hurt while you were working for the Magnolia, yourself?

A. Why, I liked to have got burned up.

Q. You had a suit against the Magnolia?

A. Not exactly.

Q. You worked for them, and you worked for the Lion—before the Magnolia or afterwards?

A. I worked for the Magnolia last.

Q. And the Lion before that?

A. Yes, sir.

Q. How long have you been in the field, in the Smackover district?

A. Ever since the Smackover boom.

Q. You worked for these three companies?

A. Yes, sir.

Q. And are still working for the Phillips Petroleum Company?

A. Yes, sir.

Q. Are you still foreman?

A. No, sir; I am pumping at the present time.

Q. This string of pipe shown in the picture there, didn't you change the pipe, the location of it, after Jenkins got hurt?

A. Did we change the location?

Q. Didn't you find you had the string crooked, or something like that?

[fol. 149] A. (Hesitating.)

Q. The way it is there, that is not the same as it was there on the day of the accident?

A. We changed the location of it; we were following the slough, and we changed the line, and decided not to follow the slough.

Q. The way it is shown in this picture is not the same it was on the day of the accident?

A. We changed it some.

Q. How do you know the stump here is the same?

A. That had been laid; that part of it; and we changed our place where we were going.

Q. Changed it to somewhere else?

A. Yes, sir.

Q. You are sure this is the right site?

A. Yes, sir; I know that.

Q. How long after Jenkins fell do you think it was before you got there?

A. Well, it could not have been very long. I asked some of the boys, and they said twenty-five or thirty-five minutes.

Q. You found him there sitting on a log?

A. Yes, sir.

Q. And you asked him what was the matter?

A. Yes, sir.

Q. You testified he didn't say anything about Myers jerking the pipe, or throwing him in the hole; you didn't [fol. 150] ask anything about that, did you Mr. Forsythe?

A. Joe told me that; Joe told me he had fell.

Q. I understand about him falling in the hole. You said there was nothing said about Joe Myers shoving him in the hole?

A. There was nothing said about it.

Q. You didn't stop and ask him all of the details—Jenkins was suffering pretty bad at the time, wasn't he?

A. Seemed to be.

Q. You didn't go into details how it happened; you said you found out he fell in the hole?

A. Yes, sir.

Q. There was no occasion for him telling you that Joe Myers shoved him in the hole?

A. They didn't tell me anything about that; nothing was said about it.

Q. Jenkins didn't tell you that before he left?

A. No, sir.

Q. He was groaning pretty bad?

A. He was groaning some, yes, sir.

Q. You say, the day before that Jenkins was complaining about his back hurting?

A. Yes, sir.

Q. And you gave him an easy job?

A. Yes, sir.

Q. Didn't all of the men working around there alternate in using the hammer?

[fol. 151] A. No, sir; you have to have a regular collar pounder. You have to keep in turn with the hammer and the hooks.

Q. You call that an easy job?

A. It is not like heading the hooks.

Q. How come Jenkins to be carrying pipe if there was something the matter with his back?

A. I told them to string the pipe and they—all of the men, and they did it to suit themselves while I was gone.

Q. You didn't think there was anything the matter with his back, or you would not have him stringing pipe; isn't it a fact if Jenkins had been on the job, complaining that way, he wouldn't have stayed on there very long, if there was anything the matter with his back—would he?

A. He commenced complaining to me, and I says, "if you are hurting why don't you go in and stay".

Redirect examination.

By Judge Marsh:

Q. What did he say to that?

A. Well, he said, "they will work me a little while and can me anyhow.

Q. What?

[fol. 152] A. They will work me a little while and can me anyhow.

Q. What did he mean by that?

A. Well, there are several meanings to it.

Recross-examination.

By Mr. Smead:

Q. If he wasn't able to do the work they would can him pretty quick, wouldn't they?

A. The company pays you good and they expect you to work.

Q. If you cannot do the work they don't want you?

A. Yes, sir.

Redirect examination.

By Judge Marsh:

Q. That is the rule with every company?

A. Yes, sir.

Witness excused.

[fol. 153] WILL MCGUIRE, a witness for the defendants, being first duly sworn that the testimony he should give in this case should be the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Judge Marsh:

Q. What is your name?

A. Will McGuire.

Q. Where do you live?

A. I live in Smackover.

Q. What do you do?

A. Work for the Phillips Petroleum Company.

Q. What is your job?

A. General—well, the laborer, I guess.

Q. Working in the roustabout gang?

A. Yes, sir.

Q. Do you know R. O. Jenkins?

A. I do.

Q. Did he work with you out there?

A. For a while, yes, sir.

Q. Were you in the crew the day he had the accident?

A. In the morning that he got hurt I wasn't. I worked with that same crew in the afternoon.

Q. Had you worked with that crew the day before?

[fol. 154] A. Yes, sir.

Q. Was he in the crew the day before?

A. Yes, sir.

Q. What were you doing then?
A. We were connecting pipe, and laying pipe line.
Q. At that lease, or another one?
A. At another one.
Q. Did you have any conversation with him that day?
A. Yes, sir.
Q. What was it?
A. Well, he was talking to us about hurting him.
Q. Had he had an accident to his foot before that——
A. Yes, sir.
Q. —That you know of?
A. Yes, sir.
Q. How long had he been back at work after getting over that?
A. As well as I remember, about four or five days.
Q. Did he complain of anything else hurting him?
A. Said his foot and hip.
Q. His foot and hip?
A. Yes, sir.
Q. Did he get about actively, or clumsily?
A. He was clumsy.
Q. Did his movements indicate that he wasn't feeling well?
A. Apparently so, yes, sir.
[fol. 155] Q. You haven't worked with him since the accident?
A. No, sir.
Q. You are still working for the company, are you?
A. Yes, sir.

Cross-examination.

By Mr. Smead:

Q. What are you doing for the Phillips Petroleum Company, Mr. McGuire—I didn't understand?
A. Roustabouting.
Q. Still working for them?
A. Yes, sir.

Redirect examination.

By Judge Marsh:

Q. Were you working where this pipe was laid when he got hurt?

A. Yes, sir; in the afternoon.

Q. You hadn't worked there before?

A. No, sir.

Q. Did anyone show you the place where it was supposed [fol. 156] to have occurred?

A. They didn't show me any hole, no, sir.

Q. Did you examine the place?

A. Well, I was up and down the line, working on the line.

Q. Was there any such a thing as a hole there, five feet long, and eighteen inches wide, and a foot to eighteen inches deep?

A. No, sir; not that I saw.

Q. Was there any such a thing up and down that line anywhere?

A. No such thing as that.

Q. Did you see a hole there by the stump where his foot was said to have gone in?

A. I never noticed any hole at all.

Q. You didn't look for it?

A. No, sir.

Recross-examination.

By Mr. Smead:

Q. Mr. McGuire, how long would it take a gang of men to lay a pipe line like that across the field there?

A. Well, we got across the field that day.

[fol. 157] Q. At it all one day?

A. I put in a half day on it.

Q. What I mean, they didn't work around there several days; they put that stuff down and got away to somewhere else?

A. They move along with the line.

Q. That territory where this happened, there was no reason why you would remember very much about it?

A. I come right by the pipe line, right from where they began laying it.

Q. You would not remember any particular thing about it; they lay it fast and go on and do something else?

A. What was that.

Q. Were you there after Jenkins was hurt?

A. Yes, sir; afterwards.

Q. How long afterwards?

A. I could not say—about one O'clock.

Q. You didn't come up to see about him being hurt?

A. No, sir; I come from work.

Q. You were working; you were not paying any attention to Jenkins getting hurt?

A. No, sir.

Q. You didn't expect him to get hurt?

A. No, sir.

Q. And you didn't inspect the place where he fell?

A. No, sir.

Q. You were working?

A. Yes, sir.

[fol. 158] Q. Judge Marsh asked you about this hole not being there; this was just a creek bottom, place?

A. It was what you termed a bottom.

Q. All sorts of hole[illegible]tumps, and everything else in there?

A. I didn't notice any holes.

Q. You didn't notice any; you were not paying any attention to them?

A. I am always watching for holes when I am working.

Witness excused.

THOS. H. NORRIS, JR., a witness for the defendants, being first duly sworn that the testimony he should give in this action should be the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Judge Marsh:

Q. State your name to the jury?

[fol. 159] A. Thomas H. Norris, Jr.

Q. Where do you live?

A. El Dorado.

Q. What do you do?

A. Work for the Phillips Petroleum Company.

Q. Were you working with the Phillips Petroleum Company on the Flemming Lease on the 5th of April, 1934—this last April?

A. Yes, sir.

Q. Do you know R. O. Jenkins?

A. Only by sight.

Q. Did you see him at work there that day?

A. Yes, sir.

Q. Did you work there in the crew with him?

A. Yes, sir.

Q. The same crew he was in?

A. Yes, sir.

Q. What were you doing?

A. Carrying pipe across a flat there, along side of the slough.

Q. Who was your partner carrying pipe?

A. Well, I don't recollect who that was. I think it was Grayson, though.

Q. You think it was Grayson?

A. Yes, sir.

Q. Just whoever happened to be at the other end of the pipe when you picked up, you went on with?

[fol. 160] A. Yes, sir.

Q. You didn't pair off partners?

A. No, sir.

Q. Did you see Mr. Jenkins fall there, at a stump, near that pipe line that day?

A. No, sir.

Q. What did you see, if anything, with reference to the accident?

A. I saw him right after he had fallen. He was bent over, sitting down on a log.

Q. Did you see where he had fallen?

A. Yes, sir.

Q. Did you go out there and look at it?

A. Yes, sir.

Q. What did you see there?

A. Just a place there on the ground about the size of a foot, where the ground had caved, or gave way.

Q. Was it a new, fresh place?

A. Yes, sir.

Q. How deep was it?

A. About a foot, I should think.

Q. Looked to be freshly made?

A. Yes, sir.

Q. Was that in the regular path you went up and down, the regular way you went up and down carrying that pipe, when you were stringing it?

A. Yes, sir.

Q. Had you been by that place before?

[fol. 161] A. Yes, sir.

Q. How many times had you been by it that morning?

A. Several times; I don't know the exact number.

Q. Look at that (handing witness photograph) and see if you recognize the place in the picture?

A. Yes, sir; there it is, right there (pointing out on picture).

Q. Is that the same stump that you referred to?

A. I could not positively identify the stump, but it was by the side of a stump.

Q. You recognize it as the place?

A. Yes, sir.

Q. Was there any hole there before this time you went and looked at it, after you saw him on the log, sitting on the log, leaning over?

A. No, sir.

Q. Was there any such a thing there as a hole anything like five feet long, and eighteen inches wide, and a foot deep?

A. No, sir.

Q. How big was this hole; how big was the one you saw there after the accident?

A. About the size of his foot.

Q. Just where the ground had given way and his foot gone down?

A. Yes, sir.

Q. You don't know which foot it was?

A. No, sir.

[fol. 162] Q. It was close to the s-ump?

A. Yes, sir.

Q. Did you talk to him after the accident, or not?

A. No, sir.

Q. What kind of pipe were you using, or stringing there?

A. Two and a half inch tub ng.

Q. Just like that, there (indicating joint of pipe in the court room)?

A. Yes, sir.

Q. What was the length of it?

A. It will average around twenty-one feet.
Q. Did you help weigh that pipe yesterday?
A. Yes, sir.
Q. That joint?
A. Yes, sir.
Q. What did it weigh?
A. Not quite one hundred and two pounds.
Q. Between one hundred and one, and one hundred and two pounds?
A. Yes, sir.
Q. Did you have any thirty-one foot pipe to carry that day?
A. No, sir.
Q. Or any other time, stringing out there in the pipe line?
A. No, sir.

[fol. 163] Cross-examination.

By Mr. Smead:

Q. Mr. Norris, you didn't see Jenkins fall?
A. No, sir.
Q. You don't know what kind of pipe he was carrying, except to know what you were stringing; you know what you carried, but you don't know what he was carrying?
A. All of the pipe was the same length, approximately—all two and a half inch up-set tubing.
Q. You don't know that, do you Mr. Norris?
A. Yes, sir.
Q. How do you know it?
A. It was all hauled up and piled up by the truck, and the tubing run the same length.
Q. How long was it?
A. About twenty-one feet.

Redirect examination.

By Judge Marsh:

Q. They hauled the pipe out there and you all were toting from the same pile?
A. Yes, sir.

Witness excused.

[fol. 164] C. M. Odin, a witness for the defendants, being first duly sworn that the testimony he should give in this action should be the truth, the whole truth, and nothing but the truth, testified as follows:

Direct examination.

By Judge Marsh:

Q. State your name to the jury?
A. C. M. Odin.
Q. What is your position with the Phillips Petroleum Company?
A. I am production superintendent for the Arkansas District.
Q. You live at Smackover, do you?
A. Yes, sir.
Q. You were not out there the day of the accident?
A. Yes, sir.
Q. You didn't see any of it?
A. No, sir.
Q. Do you know who was in the gang?
A. Yes.
Q. Who?
A. Jim Forsythe was gang-pusher—I will qualify that, this way: I know he was supposed to be out there, and I checked the foreman's time sheet, and it showed he was there.
[fol. 165] Q. I will give it to you this way: Was a Mr. Grayson in the gang?
A. Yes, sir.
Q. Do you know where he is?
A. He is somewhere in Oklahoma.
Q. You have tried to locate him, have you?
A. Yes, sir.
Q. Could you locate him?
A. I hadn't located him, up until last night. We have got the superintendents in Oklahoma, and they are trying to locate him now.
Q. So far, you don't know whether he is located or not?
A. No, sir.
Q. Is Mr. Pickett in Oklahoma too?
A. Yes, sir; he is somewhere in Oklahoma.
Q. You haven't been able to get in touch with him?

A. No, sir; not so far.

Q. Have all of the rest of the crew that was working there at the time of this alleged injury testified here today?

A. Yes, sir.

Q. Working out there at the time of the accident?

A. Yes, sir.

Cross-examination.

[fols. 166-234] By Mr. Smead:

Q. I didn't understand you—was there a man named Pickett out there?

A. Yes, sir.

Q. Where did you say he was?

A. He is supposed to be in Oklahoma?

Q. And Grayson is supposed to be in Oklahoma?

A. Yes, sir. That is where they gave their address on the report card.

Witness excused.

[fol. 235] C. M. Odin, a witness for the defendants, being recalled for further examination by the defendants, testified as follows:

Direct examination.

By Judge Marsh:

Q. The plaintiff stated yesterday that you kept calling for him to take him to the doctor's office. Did you take him to the doctor's office, and how many times?

A. I don't know how many times, but Doctor Henry had been treating his case, and I got a phone call in the office one morning from a man named Green, I believe it was; called me over the telephone, and he says——

Mr. Smead: Don't state what he said—oh, go ahead.

Judge Marsh (Continuing):

Q. What did you do?

A. He called up and said that Jenkins was in bad shape, and wanted to change doctors; so I went over to see him

a few times, and had my district foreman to call on him. And so I went out and called Doctor White. Doctor White examined him before. And he decided he should go to the hospital; so he spent eight or ten days in the hospital; and [fol. 236] Doctor White thought he was able to go back home. Jenkins said he didn't have a way to get in and out to the doctor's office, and I says, "well, either myself, or one of my foremen, will take you to and from the doctor's office." I made several trips over there, and I think I had some of the other boys go, along the latter part, I would say about the middle of May. I think I made a trip or two, I don't remember. Anyhow, I left word with the district foreman to see that Jenkins had transportation to and from the doctor's office, and he made a trip or two over there, and he didn't locate Jenkins, and I sent another man over there, and I made a trip myself, and could not locate him; and we contacted his wife, and he was out of town, for the time being. Doctor White said his case was progressing satisfactorily, and it wasn't necessary to bring him back every day; and, like that day was Wednesday, he said he would see him Friday or Saturday, "whatever is convenient for you boys."

Q. Did he sue the company in the Union Circuit Court, at El Dorado?

A. Yes, sir.

Q. Had he brought suit against the company while you were carrying him to and from the doctor's office?

A. Yes, sir.

Q. Do you remember the date of the suit?

A. No, sir. It was some time along pretty close to the middle of May, though.

[fol. 237] Q. Look at that summons; that is the summons that was issued?

Mr. Smead: There is no dispute about that.

Judge Marsh: The 17th of May is when he brought the suit.

Judge Marsh (Continuing):

Q. After that you didn't take him any more, after he filed the suit?

A. No, sir.

Judge Marsh: I want to introduce this summons.

The Court: Let it be introduced.

Note by reporter: The summons mentioned above is marked Exhibit A to the testimony of C. M. Odin, and a copy of same will be found herein immediately following the testimony of this witness.

Judge Marsh: For the purpose of showing the date of the suit.

Cross-examination.

By Mr. Smead:

Q. The suit was dismissed down there, that was brought?
A. I understood it was.

[fol. 238] Q. Now, at the time that Jenkins was being brought to Doctor White didn't Jenkins tell you that he thought he should be taken to a specialist?
A. He kicked about all the doctors we took him to.
Q. And you took him to Doctor White?
A. Yes, sir.
Q. And you told him that Doctor White was the Company Doctor?
A. Yes, sir; I did.

Witness excused.

EXHIBIT A TO TESTIMONY OF C. M. ODIN

IN THE CIRCUIT COURT OF UNION COUNTY, ARKANSAS, SECOND DIVISION

No. 6164

R. O. JENKINS, Plaintiff,

vs.

PHILLIPS PETROLEUM CO., Defendant.

Summons

State of Arkansas, To the Sheriff of Union County, Arkansas, Greeting:

[fol. 239] You are commanded to summon Phillips Petroleum Co., to answer in twenty days after the service of this

summons upon them a complaint filed against them in the Circuit Court of Union County, Arkansas, Second Division thereof, and warn them that upon their failure to answer said complaint that same will be taken for confessed; and you will make due return of this summons on the first day that said Court is in session after twenty days after the date of the issuance hereof.

Witness my hand and the seal of said Court, this 17th day of May, 1934.

H. R. F. Goode, Clerk, by —— ——, D. C. (Seal.)

STATE OF ARKANSAS,
County of ——, ss:

On the — day of ——, 193—, I have duly served the within writ by delivering a copy, and stating the substance thereof to the within named —— as I am hereby commanded.

—— ——, Sheriff, by —— ——, Deputy.

[fol. 240] No. 6164

Summons

Union Circuit Court, Second Division

R. O. Jenkins, Plaintiff,

vs.

Phillips Petroleum Co., Defendant

Sheriff's Fees

Service	$.....
Mileage	$.....
Returns	$.....
Total	$.....

J. V. Spencer, Attorneys.

June 16, 1934.

(Endorsed in ink on face of Summons): Dismissed, June 16, 1934, in vacation.

[fol. 241] M. T. KIRK, a witness for the defendants, being first duly sworn, testified as follows:

Direct examination.

By Judge Marsh:

Q. State your name to the jury?
A. M. T. Kirk.
Q. Are you connected with the Phillips Petroleum Company?
A. I am, yes, sir.
Q. What is your employment, or position?
A. My title is Special Agent. I work in various departments. My special work is claim work.
Q. You are in the claim department?
A. Yes, sir; among others.
Q. Mr. Kirk, is the Phillips Petroleum Company protected by any liability or casualty insurance in this case?
A. Not in the state of Arkansas.
Q. There is no insurance in this case?
A. No, sir.

Cross-examination.

[fol. 242] By Mr. Smead:

Q. You have insurance, but it doesn't cover this case?
A. We have insurance for the employees; $500.00 insurance for each six months the employee has been with the company.
Q. This company doesn't need insurance; what is the reason; because they don't need it.
A. I don't know.

Witness excused.

[fols. 243 & 244] Defendants rests.

The plaintiff, to further sustain the issues on his behalf, introduced the following testimony, in rebuttal, to-wit:

[fol. 245] R. O. JENKINS, the plaintiff, being recalled for testimony in rebuttal, testified as follows:

Direct examination.

By Mr. Smead:

Q. Your name is R. O. Jenkins, and you are the plaintiff in this case?

A. Yes, sir.

Q. Mr. Jenkins, Jim Forsythe testified that you complained to him the day before you claim to have been hurt there, of your foot and your back, and also Will McGuire testified that you said, the day before, that your foot and hip were hurting?

A. I don't know Mr. McGuire.

Q. Did you make that statement to anybody?

A. No, sir; I did not make any such statement.

Q. Mr. Jim Forsythe testified you had a conversation with him the day before, about a man getting a pension at the Macmillan Company; did you say anything like that?

A. No, sir; I didn't have any such a conversation.

No cross-examination.

Witness excused.

[fol. 246] Notation by Reporter

At this stage of the trial Mr. Smead, counsel for plaintiff, requested the court to permit the jury to pick up the joint of pipe in the court room, and which was discussed in the testimony, which request was granted by the court, and, thereupon, several members of the jury did pick up the pipe in question.

Thereupon, Mr. Smead, counsel for plaintiff, requested permission of the court to recall the plaintiff, R. O. Jenkins, for further examination, and there being no objection by the defendants, said request was granted, and the plaintiff recalled.

R. O. Jenkins, the plaintiff, being recalled for further examination, on his own behalf, testified as follows, to-wit:

Direct examination.

By Mr. Smead:

Q. Your name is R. O. Jenkins?

A. Yes, sir.

Q. You are the plaintiff in this case?
[fol. 247] A. ——.
Q. Have you worked any since you received your injury?
A. Not at all.
Q. Have you been able to perform any work since that time?
A. None at all.

No cross-examination.

Witness excused.

Plaintiff rests.
Defendants rest.

The above and foregoing was all of the testimony adduced on the trial of this cause.

[fol. 248] DEFENDANTS' MOTIONS FOR DIRECTED VERDICT

Thereupon, the defendant Phillips Petroleum Company, at the close of all of the testimony in the case, moved the court to instruct the jury to return a verdict in its favor, and submitted to the court its written instruction in support of its said motion, in words as follows, to-wit:

Defendant's Instruction No. 1

(Refused.)

"You are instructed to return a verdict for the defendant, Phillips Petroleum Co."

But the court overruled said defendant's motion for a directed verdict in its favor, and refused to give to the jury said defendant's requested written instruction numbered 1, set out above, and failed and refused to instruct the jury to return a verdict in favor of the defendant Phillips Petroleum Company. To which actions, rulings and orders of the court, the defendant Phillips Petroleum Company at the time and in proper manner, separately and severally saved its exceptions; which separate and several exceptions were then and there duly noted of record.

Thereupon, the defendant Joe H. Myers, at the close of [fol. 249] all of the testimony in the case, moved the court to instruct the jury to return a verdict in his favor, and

submitted to the court his written instruction in support of his said motion, in words as follows, to-wit:

Defendant's Instruction No. 2

(Refused.)

"You are instructed to return a verdict for the defendant, Myers."

But the court overruled said defendant's motion for a directed verdict in his favor, and refused to give to the jury said defendant's requested written instruction numbered 2, set out above, and failed and refused to instruct the jury to return a verdict in favor of the defendant Joe H. Myers. To which actions, rulings and orders of the court, the defendant Joe H. Myers at the time and in proper manner, separately and severally saved his exceptions; which separate and several exceptions were then and there duly noted of record.

Oral Instructions by the Court

"Gentlemen of the jury, the court will now give you the [fol. 250] instructions in the case, which you will take and consider as a whole, and when the instructions given you are considered together and as a whole, they will constitute the law by which you will be governed in making up your verdict.

The burden is upon the plaintiff to establish the allegations of his complaint by a preponderance or greater weight of evidence. By a preponderance of the evidence is meant, by a greater weight of the testimony.

The burden is upon the defendant to establish the defenses of contributory negligence and assumed risk, unless that is shown by the evidence on the part of the plaintiff.

Plaintiff's Requested Instructions, Given

Thereupon the Court, over the separate and several objections of the defendants, and each of them, separately and severally, gave to the jury plaintiff's requested written instructions respectively numbered 1 and 2, in words and figures as follows, to-wit:

[fol. 251] Plaintiff's Instruction No. 1

(Given.)

You are instructed that if you find from a preponderance of the evidence that plaintiff and defendant, Joe H. Myers, in the performance of their duties as employees of the defendant, Phillips Petroleum Company, were carrying a joint of pipe as alleged in the complaint, the front end of said pipe resting on plaintiff's shoulder and the rear end of said pipe resting on the shoulder of the defendant, Joe H. Myers; and you further find from a preponderance of the evidence that the defendant, Joe H. Myers, without warning, shifted said pipe from one shoulder to the other and jerked said pipe; and you further find that said shifting and jerking of said pipe without warning constituted negligence; and you further find from a preponderance of the evidence that as the direct result of such negligence on the part of Joe H. Myers in so shifting and jerking said pipe without warning, plaintiff lost his balance and fell and was injured; and you further find that plaintiff was at the time in the exercise of ordinary care for his own safety, and had not assumed the risk, then you will find for the plaintiff and against both of the defendants.

[fol. 252] Plaintiff's Instruction No. 2

(Given.)

You are instructed that if you find for the plaintiff your verdict will be for such an amount of damages as you find from a preponderance of the evidence in this case will reasonably compensate the plaintiff for all physical pain and mental anguish suffered or endured by him on account of the injuries complained of, if any; also, any further physical pain and mental anguish which the evidence may show with reasonable certainty the plaintiff will suffer and endure on account of the injuries sustained by him, if any; also, any pecuniary loss heretofore suffered by the plaintiff on account of the injuries complained of, if any; and also such sum as will reasonably compensate the plaintiff for any damages which the evidence may show with reasonable certainty he will suffer in the future on account of diminished capacity for earning money, if any; provided, however, if you find that the plaintiff was himself guilty of

negligence contributing to his injury, then you will find for the defendant, Joe H. Myers, and, as to the defendant, Phillips Petroleum Company, you will diminish the plaintiff's damages, if you find he is entitled to recover, in proportion to the amount of negligence found by you to be attributable to the plaintiff.

[fol. 253] To which actions and rulings of the court, separately and severally, in giving to the jury plaintiff's requested written instructions respectively numbered 1 and 2, set out above, the defendants, and each of them, at the time and in proper manner duly saved their separate and several exceptions, which exceptions were then and there duly noted of record.

DEFENDANTS' REQUESTED INSTRUCTIONS, GIVEN

Thereupon, the Court gave to the jury defendant's requested written instructions respectively numbered 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12, in words and figures as follows, to-wit:

No. 3

(Given.)

There is only one allegation of negligence in the complaint, and that is, that the defendant Myers carelessly and negligently shifted the end of the pipe which he was carrying from one shoulder to the other, and carelessly, negligently and violently jerked on the piece of pipe which he and the plaintiff were carrying.

In considering whether the defendants were negligent, the jury will be confined to the one allegation of negligence.

[fol. 254] No. 4

(Given.)

Negligence is the failure to do what a man of ordinary prudence would do under like or similar circumstances, or the doing of something that a man of ordinary prudence would not do under like or similar circumstances.

No. 5

(Given.)

You are instructed that the burden of proof is upon the plaintiff in this case, to show by a preponderance of the

evidence that the defendant Myers carelessly and negligently shifted the end of the pipe which he was carrying from one shoulder to the other shoulder, and carelessly, negligently and violently jerked, or pulled, on the pipe. If the evidence of the defendants on the question of negligence outweighs the evidence offered by the plaintiff, or if the evidence of the parties is equally balanced, it will be the duty of the jury to return a verdict for the defendants.

No. 6

(Given.)

You are instructed that there is no presumption of negligence arising in this case, and if you find that the plain-
[fol. 255] tiff was injured, such in itself would not be sufficient to entitle the plaintiff to recover.

There is a presumption of law that the defendants were not negligent, and the burden is upon the plaintiff to overcome the presumption.

No. 7

(Given.)

You are instructed that a servant assumes all of the risks and hazards incident to the employment which he undertakes. He assumes all risks which are open and obvious, regardless of whether he knows of them. He also assumes all risk of which he has knowledge and appreciates the danger arising therefrom.

No. 8

(Given.)

If you believe and find from the evidence that the defendant Myers did not carelessly and negligently shift his end of the pipe from one shoulder to the other, and did not carelessly, negligently and violently jerk on the joint of pipe which he and the plaintiff were carrying, it will be your duty to return a verdict for the defendant.

[fol. 256] No. 9

(Given.)

The plaintiff and the defendant Myers were carrying a joint of pipe which was to be used in the construction of a pipe line. Under the evidence in the case, it was not the

duty of the defendants, or either of them, to have cleared or prepared a way for plaintiff to walk at the place where he alleges he was injured, and neither was it the duty of the defendants, or either of them, to have directed the plaintiff as to where he should walk in carrying the pipe. The plaintiff was walking forward and ahead of the defendant Myers, and it was solely his duty to select the path or ground on which he would walk at the place where he alleges he fell.

No. 10

(Given.)

If you believe from the evidence that as the plaintiff and the defendant Myers were carrying the piece of pipe, the plaintiff came to a place where the ground was not firm and secure, and that when the plaintiff stepped thereon, it gave way with him, permitting his foot to sink into the soil and causing him to lose his balance and fall, then the court instructs you that the defendants would not be liable unto the plaintiff for any injury or injuries which he may have sustained in such manner.

[fol. 257]

No. 11

(Given.)

If you believe, from the evidence, that the plaintiff did not exercise reasonable care in selecting a place to walk and, because thereof, stepped on or against some object, or into a hole in the ground, which caused him to trip and fall, and you further find that such was the sole and proximate cause of any injury which he may have received, it will be your duty to return a verdict for the defendant.

No. 12

(Given.)

If the plaintiff took an awkward step or was careless and negligent in failing to look where he walked, and such was the sole and proximate cause of any injury which he may have sustained, he cannot recover.

ORAL INSTRUCTIONS OF THE COURT

Thereupon, the court, of its own motion, orally instructed the jury as follows:

[fol. 258] Gentlemen of the jury, you are further instructed that you are the sole judges of the weight of the evidence and the credibility of the witnesses. In determining the weight to be attached to the testimony of any of the witnesses testifying in the case you may take into consideration their manner and demeanor while on the witness stand; any bias or prejudice, if any shown; any interest, if any, in the result of your verdict for or against either party; any conflicts or contradictions which may arise in the testimony of any of the witnesses, which may arise in their own testimony, or which may arise when compared with the testimony of other witnesses testifying in the case; their knowledge and means of knowing the facts about which they have testified; the reasonableness or unreasonableness of the testimony of any of the witnesses; and in the observance of these rules you will apply your own common knowledge of men, and the motives of men, in affairs, and find the truth, and present that in your verdict.

Thereupon, after the closing arguments of counsel the court instructed the jury as to the forms of verdict which could be returned by it in this case, as follows, to-wit:

Gentlemen of the jury, if you find for the plaintiff in this case, as against both of the defendants, the form of your [fol. 259] verdict will be, "We the jury find for the plaintiff and against the defendant Phillips Petroleum Company and the defendant Joe H. Myers, and assess his damages" in such sum as you believe from the evidence he is entitled to recover.

If you find for the plaintiff, but only against one defendant, then the form of your verdict will be, "We the jury find for the plaintiff, against", whichever defendant you find is liable, naming such defendant, in such sum as you believe from the evidence he is entitled to recover.

If you find in favor of the defendants, then the form of your verdict will be, "We the jury find for the defendants".

If your verdict is unanimous, one of the members of the jury will sign it as foreman. If the verdict is not unanimous, but is agreed to by as many as nine, but less than twelve, then all agreeing to the verdict will sign it. Whatever the verdict may be, write it out on a piece of paper and return it into open court. You may retire now to consider of your verdict.

[fol. 259a] Thereupon, and before consideration by the jury of a verdict, the hour of five o'clock p. m. having arrived, court was adjourned until nine o'clock of the following day, with the following directions to the jury:

Gentlemen of the jury, during the recess of the court you will be permitted to separate, but don't discuss the case among yourselves, and don't permit anybody to discuss it with you. All of the evidence has been introduced, the law has been given to you by the court, and the case argued and submitted to you for your consideration in arriving at a verdict. You have heard everything about the case that is to hear; the only thing remaining for you is, to deliberate and arrive at your verdict. Until you do reach a verdict don't deliberate on the case, except when you are here together in the jury room. During the time of the recess of the court don't talk together about the case and don't allow anybody to discuss it or say anything about it in your presence or hearing. Do not do any deliberating or talking among yourselves. While you are away and separated leave everything about the case off; don't read anything in the papers about it, and don't say anything about it until you come back in the jury room. You may go until nine o'clock tomorrow morning.

Thereupon at nine o'clock of the morning of the 29th day of September, 1934, the jury retired to the jury room to consider of their verdict, and later, and on the same day, returned into open court the following verdict, to-wit:

VERDICT

"We the jury find for the plaintiff against the defendants Phillips Petroleum Co. and Joe H. Myers and assess the plaintiff's damages at $50,000.00.

J. W. Harrell, Foreman."

[fol. 259b] ORDER APPROVING BILL OF EXCEPTIONS

Wherefore, on this the 22 day of February, 1935, the foregoing bill of exceptions is presented to the Honorable W. A. Speer, the regular Judge of the Ouachita Circuit Court, Second Division, in the Thirteenth Judicial Circuit of Arkansas, presiding during all said proceedings, and is

by him examined and found to be a correct, true and complete record thereof and is by him approved as such and ordered to be filed as a part of the record of said cause.

Witness my hand as such Judge on this the 22 day of February, 1935.

(Signed) W. A. Speer, Judge of the Ouachita Circuit Court, Second Division, in the Thirteenth Judicial Circuit of Arkansas.

O. K.
J. V. Spencer, for Pltff. Marsh & Marsh, Mahony & Yocum, for Deft.

[fol. 259c] Reporter's Certificate to foregoing transcript omitted in printing.

Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 260 & 261] Supersedeas Bond on Appeal omitted in printing.

[fol. 262] IN SUPREME COURT OF ARKANSAS

JUDGMENT—May 6, 1935

This cause came on to be heard upon the transcript of the record of the circuit court of Ouachita county, Second division, and was argued by counsel, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said circuit court in this cause, except in this: The verdict and judgment for fifty thousand dollars as damages is excessive; but this error may be cured by modifying and reducing the amount of the judgment, down to thirty thousand dollars.

It is therefore considered by the Court that the judgment of said circuit court in this cause rendered be, and the same is hereby, modified so as to reduce the amount of the judgment in favor of the appellee to thirty thousand dol-

lars, and that said appellee recover of said appellant and United States Fidelity and Guaranty Company, surety in the supersedeas bond filed in this cause, the said sum of thirty thousand dollars, with interest at six per cent per annum from the 29 day of September, A. D. 1934, the amount of judgment of said circuit court as so reduced; also that said appellee recover of said appellant and said surety all his costs in said circuit court in this cause expended, and have execution thereof.

It is further considered that said appellant recover of said appellee all its costs in this Court in this cause expended, and have execution thereof.

Opinion by Butler, J.; Smith, McHaney and Baker, JJ., dissent.

[fol. 263] IN SUPREME COURT OF ARKANSAS

PHILLIPS PETROLEUM COMPANY

v.

JENKINS

OPINION—May 6, 1935

BUTLER, J.

The plaintiff, R. O. Jenkins, brought suit in the Union Circuit Court against the defendants, Joe H. Myers and the Phillips Petroleum Company for damages for personal injuries. He alleged that he and Joe H. Myers were employed by the Phillips Petroleum Company and that, while acting in the line of duty and performing work for the company, he was injured on account of the negligence of the said Myers who was assisting him; that Myers was a resident of Union County, Arkansas, and that Phillips Petroleum Company is a foreign corporation. Damages were laid in the sum of $75,000.

In apt time the Petroleum Company filed its petition for removal of the cause to the Federal Court. This petition was overruled and, subsequently, the company filed an amended petition which was also overruled and denied. The original and amended petitions, while not denying that Joe H. Myers was in the employ of the Petroleum Company and assisting plaintiff in his work at the time of his

injury, alleged that the charges of negligence against the defendant, all being specifically repeated, were "wrongfully and fraudulently made for the purpose of defeating the jurisdiction of the United States District Court for the Western District of Arkansas, El Dorado Division." It was further alleged that "plaintiff and the defendant, Joe H. Myers, are residents and citizens of the State of Arkansas, and this defendant, Phillips Petroleum Company, is a resident and citizen of the State of Delaware, and the defendant, Joe H. Myers, is wrongfully and fraudulently made a party defendant in this action for the purpose of preventing a removal of this case by the defendant, Phil-[fol. 264] lips Petroleum Company, from the court in which it was filed to the District Court of the United States for the Western District of Arkansas, El Dorado Division, and this cause involves a separable controversy."

The petition for removal falls squarely within the rule announced in Chesapeake & Ohio Ry. Co. v. Cockrell, 232 U. S. 146, and C. R. I. & P. Ry. Co. v. Whiteaker, 239 U. S. 421. "It is not enough", said the court in the last case cited, "to assert that there was a fraudulent joinder of defendants, but there must be 'a statement of facts rightfully engendering that conclusion', and that 'merely to traverse the allegations upon which the liability of the resident defendant is rested or to apply the epithet 'fraudulent' to the joinder will not suffice; the showing must be such as compels the conclusion that the joinder is without right and made in bad faith.' And 'it is not such', it was said, 'unless it was without any reasonable basis.'" The trial court, therefore, properly denied the petition for removal.

Thereafter, the Petroleum Company filed its separate answer denying the allegations of negligence in the complaint and pleading, as an affirmative defense, that plaintiff assumed the risks of his employment. Joe H. Myers also answered, adopting the separate answer of the Petroleum Company as his own. The case proceeded to trial upon the issues joined and the evidence adduced. There was a verdict and judgment in favor of plaintiff in the sum of $50,000, from which is this appeal.

The Petroleum Company, in its motion for a new trial, filed approximately sixty-four days after the return of the verdict, raised the question of the constitutionality of Sec. 7137 of Crawford & Moses' Digest upon which the liability

[fol. 265] of the Petroleum Company is predicated. This section abrogates the fellow servant law insofar as it applies to corporations and creates liability as to them for injury to employees caused by negligence of fellow servants. The contention that said act is unconstitutional is one of the grounds urged for a reversal of the judgment. It is the contention of the appellee that this question was waived by the failure of the defendant in the court below to interpose this defense by demurrer, answer, or other appropriate plea. We pass this contention for the reason that this court, in numerous decisions for a period of more than twenty-five years, has upheld the constitutionality of section 7137, supra, the latest expression being in the case of Postal Tel. Cable Co. v. White, Law Rep., Vol. 56, p. 291, Ms. Op.

At the conclusion of the testimony the defendant moved for a directed verdict on the ground that there was no substantial evidence to sustain the allegation of the complaint as to the negligence of Joe H. Myers. This is the main ground urged for reversal.

The evidence relative to the circumstances out of which the negligence of Joe H. Myers is said to have arisen is in sharp and irreconcilable conflict. That adduced on behalf of the plaintiff tends to establish the following facts: on the date of the injury, plaintiff and Joe H. Myers, his fellow servant, were engaged in carrying sections of 2½" pipe from 31 to 32 feet long of an estimated weight of 250 pounds, plaintiff carrying the front end on his right shoulder and Myers carrying the rear end on his right shoulder. The territory where this work was being done was low and swampy with a good many stumps, and it was necessary for them to walk carefully to avoid the soft [fol. 266] ground, stumps and water. They had used the route over which they were carrying the pipe at the time of the accident in carrying other pipe, either that day or a few days before. A depression was in the way about five feet long and eighteen inches deep and wide. As plaintiff was in the act of stepping across this depression he felt a forward jerk of the pipe on his shoulder immediately followed by a backward movement of the pipe causing him to lose his balance and to fall into the hole or ditch, his end of the pipe falling upon him. When he fell he looked back and saw Myers holding the pipe in the crook of his

left arm. From the movement of the pipe on plaintiff's shoulder and its situation when he looked back after he fell he stated that the jerks he experienced which caused him to fall were occasioned by Myers in attempting to change the pipe from his right to his left shoulder; that this was done with no notice or warning to plaintiff. Myers testified that there was no hole or ditch in the path along which they were walking and that he was not carrying the pipe on his right, but on his left shoulder, and that he did not move or jerk the pipe as they were walking along. He said plaintiff's fall was occasioned because the earth gave away under plaintiff's foot; that there was no hole until the ground caved in when plaintiff stepped upon it; that this made a pretty good sized hole—about two feet around.

It is first argued that the sudden jerk of pipe, alleged by plaintiff to have caused the accident, was caused not by any movement of the same on the part of Myers, but because of the unevenness of the path, making it necessary at times to take either longer or shorter steps to avoid pools of water, stumps, etc. This argument, however, is not based upon any evidence. Myers did not so testify, but, on the contrary, stated that there was no unusual movement or [fol. 267] shifting of the pipe at all and that the plaintiff's fall was occasioned solely because of the ground caving in under his foot-steps.

It is next insisted that as plaintiff's back was toward Myers so that he could not actually see what movement of the pipe Myers made, if any, (which fact he admitted) his statement that Myers shifted the load from his right to his left shoulder was a mere supposition and therefore there was no evidence to justify the conclusion that the pipe was shifted in the manner stated by plaintiff. We are of the opinion, however, judging from the movement of the pipe as described by plaintiff and its situation immediately after he had fallen that the inference is justified that there was some unusual movement of the pipe made by Myers as he was carrying his end that a shift of the load from one shoulder to the other would probably have occasioned the jerks felt by the plaintiff. The jury were doubtless men experienced in the ordinary affairs of life and from the facts related as to the movement of the pipe on plaintiff's shoulder could fairly deduce the cause thereof and reach the conclusion that plaintiff's theory was correct.

It is next contended that even though Myers might have shifted the pipe, as contended by plaintiff, this would not constitute negligence. This, we think, was a question for the jury. The unevenness of the pathway and the difficulty of progress might lead to the reasonable inference that it was the duty of Myers, in the exercise of ordinary care for the safety of his fellow workman, to give some warning of his intention to change the position of the pipe. We are unwilling, therefore, to say that there was no substantial evidence tending to support the verdict of the jury.

[fol. 268] It is lastly contended that the verdict and judgment based thereon is excessive. To this we agree. Plaintiff was twenty-eight years old at the time of his injury, with a life expectancy of thirty-seven years under normal conditions. He was earning approximately twenty dollars a week. In estimating the present value of his future earnings, appellee assumed that he would have continued to earn through the remainder of his life an amount equal to his earning capacity at the time of his injury which it was also assumed was much more than he was actually earning because of economic conditions. Based on these assumptions, we are presented with a calculation which with damages for his pain and suffering, would justify the amount of the verdict. It is appellee's contention, which is supported by some testimony, that his fall resulted in injury to his spine and serious impairment of his nervous system, causing the sphincter muscles to become flaccid; that because of this he is unable to control the movements of his bowels and kidneys which will finally result in complete paralysis. If appellee's physical condition is as he contends, it is hardly to be presumed that he will live through his normal life expectancy, but, as we view the testimony, the progress and duration of his physical disabilities is more or less conjectural and there is but little evidence to show that these disabilities would be accompanied by much physical suffering. With regard to his earning capacity, it may be said that he is a common laborer with but little expectation that his earning capacity would increase with the years; rather, it is more likely that it will diminish. It is a matter of common knowledge that a man's capacity for manual labor decreases with age and when past fifty his services are not in demand.

We have been cited by both appellant and appellee, to [fol. 269] many cases where the amount of judgment allowed or reduced is thought to sustain their respective contentions. These cases, however, are but little authority, as each case, with respect to the amount of judgment, must rest upon its own peculiar facts. In the case at bar, it is our conclusion that the amount awarded is excessive and that the judgment should be reduced to the sum of $30,000. It is, therefore, ordered that the judgment of the lower court be modified to the extent mentioned and, as modified, it is affirmed.

Smith, McHaney and Baker, JJ. dissent.

[fol. 270] IN SUPREME COURT OF ARKANSAS

ORDER OVERRULING PETITION FOR REHEARING—June 10, 1935

Being fully advised, the petitions for rehearing in the following causes are by the Court severally overruled, viz:

* * * * * * *

No. 3830

PHILLIPS PETROLEUM COMPANY

v.

R. O. JENKINS

* * * * * * *

[fol. 271] IN SUPREME COURT OF ARKANSAS

[Title omitted]

PETITION FOR APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS TO THE SUPREME COURT OF THE UNITED STATES—Filed June 26, 1935

To the Chief Justice of the Supreme Court of the State of Arkansas:

Phillips Petroleum Company, a corporation, and United States Fidelity & Guaranty Company, a corporation, respectfully show:

1. Petitioners are the appellants in the above entitled cause.

2. The above named appellee filed a complaint in the Circuit Court of Ouachita County, State of Arkansas, on June 16, 1934, against Phillips Petroleum Company, a corporation, and Joe H. Myers, for damages on account of an injury alleged to have been sustained by the appellee as a result of negligence of Joe H. Myers, an employee of Phillips Petroleum Company, while the said appellee and Joe H. Myers were engaged in the performance of their duties as employees of Phillips Petroleum Company; and judgment was rendered in said cause in favor of said appellee for the sum of Fifty Thousand Dollars ($50,000.00).

3. An appeal from said judgment was taken to the Supreme Court of the State of Arkansas, where said judgment was modified by reducing the damages to Thirty Thousand Dollars ($30,000.00) and affirmed by said Supreme Court on the 6th day of May, 1935, and, thereafter, your petitioner applied for a rehearing which was denied by said Supreme Court on the 10th day of June, 1935. The judgment of the Circuit Court of Ouachita County as against Phillips Petroleum Company only was superseded by a bond executed by United States Fidelity and Guaranty [fol. 272] Company, a corporation, as surety. Judgment was entered by the Supreme Court of Arkansas against both Phillips Petroleum Company and United States Fidelity & Guaranty Company on May 6, 1935.

4. In said cause there was drawn in question the validity of a statute of the State of Arkansas on the ground of its being repugnant to the Constitution of the United States, in that Section 7137, Crawford & Moses Digest of the Statutes of Arkansas, in so far as it abrogates the common law fellow-servant rule as to all corporations of every kind and character, was alleged to deny to appellant Phillips Petroleum Company, a corporation, the equal protection of the law and to deprive it of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States; and the decision was in favor of its validity.

5. Petitioners further state that Joe H. Myers has been duly notified of the intention of petitioners to appeal from

the judgment and decision of the Supreme Court of Arkansas to the Supreme Court of the United States and has been requested to join in said appeal or to indicate that he refuses to do so, and that the said Joe H. Myers has refused to join in said appeal and has consented that petitioners may appeal from said judgment without joining him therein, as shown by the original notice hereto attached.

Petitioners further show that the constitutional question involved in this appeal affects only your petitioners and is not available to the appellant Joe H. Myers inasmuch as the statute attacked purports to make petitioner Phillips Petroleum Company liable for the acts of negligence of its employee, Joe H. Myers, to a fellow-servant.

Wherefore, petitioners pray for the allowance of an appeal from the aforesaid final judgment of the Supreme Court of the State of Arkansas against petitioner to the Supreme Court of the United States in order that the decision and judgment of said court may be examined and reversed; and further pray that a transcript of the record, proceedings, and papers in this cause, duly authenticated [fol. 273] by the Clerk of the Supreme Court of the State of Arkansas, may be sent to the Supreme Court of the United States, as provided by law. Petitioners further pray that they be granted the right to appeal without joining Joe H. Myers therein. Petitioners, desiring the appeal to be a supersedeas, pray an order touching the security to be required of them and the approval of such bond as required in this case.

The errors upon which your petitioners claim to be entitled to an appeal are those above indicated and more fully set out in the assignment of errors filed herewith.

Dated this 21st day of June, 1935.

Marsh & Marsh, Mahony & Yocum, of El Dorado, Arkansas; R. H. Hudson, R. L. Foster, of Bartlesville, Oklahoma, Attorneys for Petitioners-Appellants.

[File endorsement omitted.]

[fol. 274] IN SUPREME COURT OF ARKANSAS

[Title omitted]

NOTICE OF APPEAL—Filed June 26, 1935

To Joe H. Myers:

You will please take notice that on the 6th day of May, 1935, judgment was entered in the above entitled action by the Supreme Court of Arkansas, modifying the judgment of the Ouachita Circuit Court, Second Division, by reducing the amount of recovery to Thirty Thousand Dollars ($30,000.00) and affirming said judgment as modified, and adjudging that appellee recover of Phillips Petroleum Company and Joe H. Myers and United States Fidelity & Guaranty Company, surety on the supersedeas bond given by Phillips Petroleum Company, the sum of Thirty Thousand Dollars ($30,000.00) and costs.

You are hereby notified that Phillips Petroleum Company and United States Fidelity & Guaranty Company intend to appeal from the judgment and decision of the Supreme Court of Arkansas to the Supreme Court of the United States and hereby request you to join in said appeal or to indicate that you refuse to do so.

Dated this 21st day of June, 1935.

Phillips Petroleum Company and United States Fidelity & Guaranty Company, by R. L. Foster, Their Attorney.

[File endorsement omitted.]

[fol. 275] I hereby acknowledge service of the above notice at Little Rock, Arkansas, on this 21st day of June, 1935, and I hereby refuse to join in the appeal from the judgment mentioned therein, and consent that Phillips Petroleum Company and/or United States Fidelity & Guaranty Company may appeal from said judgment without joining me therein.

Joe H. Myers.

Witnesses: C. M. Oden, Neill C. Marsh.

[File endorsement omitted.]

[fol. 276] IN SUPREME COURT OF ARKANSAS

[Title omitted]

ORDER ALLOWING APPEAL

The petition of Phillips Petroleum Company, a corporation, and United States Fidelity & Guaranty Company, a corporation, for an appeal in the above cause to the Supreme Court of the United States from the Supreme Court of the State of Arkansas, and the assignment of errors filed therewith, and the record of said cause having been considered, it is

Ordered that an appeal be and is allowed to the Supreme Court of the United States from the Supreme Court of the State of Arkansas, as prayed in said petition, and that the Clerk of the Supreme Court of the State of Arkansas prepare and certify a transcript of the record and proceedings in the above cause and transmit the same to the Supreme Court of the United States.

It is further ordered that said appellants give good and sufficient security in the sum of Thirty-six Thousand Dollars ($36,000.00); that said appellants shall prosecute said appeal to effect and, if said appellants fail to make good their plea, they shall answer all damages and costs.

The said appellants now presenting a bond in the sum of Thirty-six Thousand Dollars ($36,000.00) with Aetna Casualty & Surety Company as surety thereon, it is ordered that the same be and is hereby approved.

It is further ordered that the appeal shall operate as a supersedeas.

[fol. 277] It appearing that Joe H. Myers, co-appellant in the above cause, has been duly notified by Phillips Petroleum Company and United States Fidelity & Guaranty Company of their intention to appeal from the judgment of the Supreme Court of Arkansas to the Supreme Court of the United States and have requested said Joe H. Myers to join in said appeal or to indicate his refusal to do so; and it further appearing that the said Joe H. Myers has refused to join in said appeal and has consented that Phillips Petroleum Company and United States Fidelity & Guaranty Company may appeal without joining him therein, it is hereby ordered that a severance be granted

and that the Phillips Petroleum Company, a corporation, and United States Fidelity & Guaranty Company, a corporation, have the right to appeal without joining J. H. Myers in said appeal.

Dated this 24th day of June, 1935.

C. E. Johnson, Chief Justice of the Supreme Court of the State of Arkansas.

[fol. 278] IN SUPREME COURT OF ARKANSAS

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 26, 1935

In support of their petition for appeal, petitioners assign the following errors in the record and proceedings in this cause (The term "appellant" refers to Phillips Petroleum Company):

1. The Supreme Court of Arkansas erred in holding that appellant's request for a peremptory instruction was properly refused by the trial court. The liability of appellant was based solely upon the alleged negligence of a co-employee and fellow-servant of appellee. Appellant was not and is not a railroad company nor engaged in the mining of coal, and would not have been liable under the law of Arkansas but for that portion of Section 7137, Crawford & Moses Digest of the Statutes of Arkansas which provides that "all corporations of whatsoever kind or character" shall be liable in damages for injuries to an employee caused by the negligence of any other agent, servant or employee. Said portion of the statute is unconstitutional and void for the following reasons:

(a) It deprives appellant of the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States, in that it unreasonably and arbitrarily discriminates against corporations by creating a liability of corporations to their employees for injuries sustained as the result of negligence of a fellow-servant, leaving individual and partnership employers engaged in [fol. 279] the same business free of liability to their employees for injuries sustained under the same circum-

stances. The Supreme Court of Arkansas erred in refusing to so hold;

(b) It deprives appellant of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, in that it unreasonably and arbitrarily makes the fact of incorporation the basis of liability of employers for injuries to their employees resulting from negligence of co-employees and fellow-servants. The Supreme Court of Arkansas erred in refusing to so hold.

2. The Supreme Court of Arkansas erred in holding that the trial court properly gave to the jury Instruction No. 1, as follows:

"You are instructed that if you find from a preponderance of the evidence that plaintiff and defendant, Joe H. Myers, in the performance of their duties as employees of the defendant, Phillips Petroleum Company, were carrying a joint of pipe as alleged in the complaint, the front end of said pipe resting on plaintiff's shoulder and the rear end of said pipe resting on the shoulder of the defendant, Joe H. Myers, and you further find from a preponderance of the evidence that the defendant, Joe H. Myers, without warning, shifted said pipe from one shoulder to the other and jerked said pipe, and you further find that said shifting and jerking of said pipe without warning, constituted negligence, and you further find from a preponderance of the evidence that as the direct result of such negligence on the part of Joe H. Myers in so shifting and jerking said pipe without warning, plaintiff lost his balance and fell and was injured; and you further find that plaintiff was at the time in the exercise of ordinary care for his own safety, and had not assumed the risk, then you will find for the plaintiff and against both of the defendants."

Said instruction, in so far as it authorizes a verdict against appellant, was erroneous in that it made appellant liable in damages for an injury to the appellee as the result of negligence of a co-employee and fellow-servant and was based upon Section 7137, Crawford & Moses Digest of the Statutes of Arkansas. Appellant was not and is not a railroad company nor engaged in the mining of coal and is not liable under the laws of Arkansas for injuries sustained by an employee as the result of negligence of a co-

employee or fellow-servant, except for that portion of Sec- [fol. 280] tion 7137, Crawford & Moses Digest of the Statutes of Arkansas which provides that "all corporation- of whatsoever kind or character" shall be liable in damages for injuries to an employee caused by the negligence of any other agent, servant or employee. Said portion of the statute is unconstitutional and void for the following reasons:

(a) It deprives appellant of the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States, in that it unreasonably and arbitrarily discriminates against corporations by creating a liability of corporations to their employees for injuries sustained as the result of negligence of a fellow-servant, leaving individual and partnership employers engaged in the same business free of liability to their employees for injuries sustained under the same circumstances. The Supreme Court of Arkansas erred in refusing to so hold;

(b) It deprives appellant of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, in that it unreasonably and arbitrarily makes the fact of incorporation the basis of liability of employers for injuries to their employees resulting from negligence of co-employees and fellow-servants. The Supreme Court of Arkansas erred in refusing to so hold.

Prayer for Reversal

For which errors petitioners pray that the said judgment of the Supreme Court of the State of Arkansas in the above entitled cause, dated May 6, 1935, be reversed and a judgment rendered in favor of said petitioners.

Dated this 21st day of June, 1935.

Marsh & Marsh, Mahony & Yocum, of El Dorado, Arkansas; R. H. Hudson, R. L. Foster, of Bartlesville, Oklahoma, Attorneys for Petitioner-Appellant.

[File endorsement omitted.]

[fols. 281 & 282] Supersedeas bond on appeal for $36,000.00 approved and filed June 26, 1935, omitted in printing.

[fols. 283 & 284] Citation in usual form showing service on R. O. Jenkins filed June 26, 1935, omitted in printing.

[fol. 285] Return to Allowance of Appeal omitted in printing.

[fol. 286] Certificate of Lodgment omitted in printing.

[fol. 287] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 288] IN SUPREME COURT OF ARKANSAS

ORDER ENLARGING TIME TO FILE TRANSCRIPT—Filed July 15, 1935

Upon motion of counsel for appellants, and for good cause shown,

It is hereby ordered that the time for filing the record in the Supreme Court of the United States is hereby enlarged and extended to the 1st day of September, 1935.

It is further ordered that this order be filed with the Clerk of the Supreme Court of the United States.

Dated this 10th day of July, 1935.

C. E. Johnson, Chief Justice of the Supreme Court of Arkansas.

[fol. 288½] [File endorsement omitted.]

[fol. 289] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Aug. 21, 1935

Come now Phillips Petroleum Company and United States Fidelity & Guaranty Company, the appellants in the above entitled cause, and adopt their assignment of errors as their statement of the points to be relied upon, and state that the following portion of the record as filed is necessary for the consideration of the case, to wit:

The entire record as filed, except:

The testimony of Dr. J. B. Jamison (R. 64 to 91A, inclusive; 243 to 244, inclusive);

The testimony of Dr. Leslie A. Purifoy (R. 92 to 104, inclusive);

The testimony of Dr. R. B. Robbins (R. 105 to 112, inclusive);

The testimony of Dr. David Levine and exhibits identified by him (R. 166 to 186 H, inclusive);

The testimony of Dr. D. E. White (R. 187 to 206, inclusive, and 242, 243);

The testimony of Dr. George B. Fletcher (R. 207 to middle of page 223, inclusive);

[fol. 290] The testimony of Dr. F. O. Mahony (R. 223 to 234, inclusive).

The testimony of the above named witnesses relates solely to the extent of the injuries to appellee and is not deemed material for the consideration of the questions to be presented to this court and may therefore be omitted from the printed record. All other portions of the record should be printed.

Dated this 7th day of August, 1935.

Marsh & Marsh, Mahony & Yocum, Rayburn L. Foster, Counsel for Appellants.

Acceptance of Service and Stipulation

Service of the foregoing statement of points to be relied upon and designation of the parts of the record to be printed is acknowledged to have been made upon appellee on this 9th day of August, 1935.

It is stipulated and agreed by appellee that the portion of the record as filed to be excluded from the printed record, according to appellants' designation, relates solely to the extent of the injuries to appellee and has no bearing upon the questions raised by appellants' assignment of errors.

This stipulation shall not preclude either party from hereafter applying to the court for an order directing the clerk to print additional portions of the record, and shall [fol. 291] not preclude the court or counsel, with the approval of the court, from referring to portions of the rec-

ord not printed if deemed necessary during the course of the argument, or otherwise during the disposition of the cause.

Dated this 9th day of August, 1935.

L. B. Smead, J. H. Spencer, Robert C. Knox, Counsel for Appellee.

[fol. 292] [File endorsement omitted.]

Endorsed on cover: File No. 39,940. Arkansas Supreme Court. Term No. 386. Phillips Petroleum Company, a Corporation, and United States Fidelity & Guaranty Company, Appellants, vs. R. O. Jenkins. Filed August 21, 1935. Term No. 386, O. T. 1935.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 386

PHILLIPS PETROLEUM COMPANY, A CORPORATION, AND UNITED STATES FIDELITY & GUARANTY, COMPANY, A CORPORATION,

Appellants,

vs.

R. O. JENKINS.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS.

STATEMENT AS TO JURISDICTION.

MARSH & MARSH,
MAHONY & YOCUM,
R. H. HUDSON,
R. L. FOSTER,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 386

PHILLIPS PETROLEUM COMPANY, A CORPORATION, AND UNITED STATES FIDELITY & GUARANTY, COMPANY, A CORPORATION,

Appellants,

vs.

R. O. JENKINS.

Appellee.

STATEMENT OF BASIS OF JURISDICTION OF THE UNITED STATES SUPREME COURT TO REVIEW JUDGMENT OF THE SUPREME COURT OF ARKANSAS UPON APPEAL.

Pursuant to United States Supreme Court Rule 12, Paragraph 1, the above appellants file this statement showing the basis on which the appellants contend that the Supreme Court of the United States has appellate jurisdiction to review on appeal the judgment appealed from herein, as